

Employment Practices Liability Insurance

Key considerations



Employment Practices Liability (EPL)

For a number of reasons, Employment Practices Liability (“EPL”) insurance is a hot topic. There have been a number of recent high profile cases involving racial and sexual discrimination and harassment. The onset of coronavirus means that employers are looking carefully at their obligations to employees, both inside and outside the workplace. Further, with the hardening insurance market, many insurers are looking to reduce or remove cover for EPL from combined policies, and increase rates for stand-alone EPL cover.

In this bulletin, we seek to explain the key features of EPL and answer some of the questions on what the product covers.

What is EPL?

EPL provides insurance coverage to employers in respect of claims made by employees arising out of alleged wrongdoing related to their employment. Typical covered claims include those for discrimination, harassment, or unfair dismissal. Negligent evaluation or failure to promote claims would also be picked up. The policy would cover any damages payable as well as legal costs in defending claims.

What is not EPL?

The insurance industry can be accused of many things, but avoiding confusing jargon and acronyms is not one of them. EPL insurance should be distinguished from EL (Employers’ Liability) insurance. EL insurance provides cover for certain physical injury or illness caused at or through work (for example, an employee injured by tripping over boxes that should have been put away). EPL policies usually have a bodily injury exclusion, to make clear they will not pick up EL liabilities.

Policyholders should also note that EL insurance is compulsory in the UK, whereas EPL is an optional cover.

What damages are excluded from an EPL policy?

Many employment claims include a claim for unpaid salary, bonuses, notice pay, or similar – often referred to in policies as employment related benefits. These elements of a claim are generally not covered under EPL insurance (whereas other elements of the same claim may be covered). They are contractual entitlements (payable directly under the contract) and (similar to most other types of insurance) EPL will not cover sums due under contract. If insurers covered these sums, an employer could simply refuse to pay its employees and then seek coverage under its

insurance when those employees claimed for money they are owed. Redundancy payments are also not covered.

Another key EPL exclusion is for wage and hours claims. These are, typically, US claims and arise from such things as misclassification of workers, non-compliance with meal/rest break requirements, failure to pay overtime, and similar. The individual claims are small but, multiplied across many workers and often over a period of years, the final damages award can be for significant seven or eight figure sums. Those figures grab headlines, and will attract the attention of anyone with US operations. However, it is crucial to keep in mind that these types of claim are excluded from EPL policies. Specialist coverage may be available, but exposure to this type of claim should not influence your decision to buy a regular EPL policy.

The UK cap on employment related damages

Even once an insured has established the sort of losses that will be covered under an EPL policy, it is worth giving some thought to the extent of potential losses. In the UK, financial caps apply to many constructive or unfair dismissal claims. At present, the cap is £16,140 for the “basic award”, plus up to £88,519 for the “compensatory award”. A deductible of £100,000 (or more) for EPL will, in a practical sense, remove cover for most single claims subject to the UK cap. Lower deductibles can also have a meaningful impact on potential cover. There are, however, a number of important considerations:

1. Certain categories of claim are exempt from the cap. These include claims for discrimination or whistleblowing. Harassment claims are also outside of the regime.
2. Legal costs would also be covered by the policy, which could make the overall loss much higher (if a claim is defended and then lost).
3. An EPL policy will likely contain an aggregation and/or Single Claim clause. The effect of that clause will mean that related claims could be subject to a single deductible. Therefore, related smaller claims could still exceed the retention.
4. Different considerations may apply in other jurisdictions. EPL claims in the US have been for many millions of dollars, and you will need to check the local position in countries in which you operate.

Settlement and confidentiality

A fundamental issue on settlement is the claims control/handling/co-operation clauses under your policy. Settlement offers should be discussed with insurers. Failure to obtain insurer consent may mean a settlement will not be covered under your policy. That is similar to any other form of liability insurance (e.g. Professional Indemnity).

A further settlement issue is that in many EPL claims there will be some elements of the claim that are covered and others that are not covered (such as employment related benefits, referred to above). Settlements of a claim are typically for a single sum, rather than by reference to coverage provided under an insurance policy. Debates on allocation of settlement sums between policyholders and insurers are, therefore, a frequent occurrence with EPL claims. To avoid those debates, agreement with insurers should be sought in advance on what elements of the settlement sum are covered (with a policyholder’s position supported by sound reasoning and legal advice, if possible). Your insurance broker can help you navigate these issues.

EPL claims may lead to additional considerations due to their inherent sensitivity. In certain circumstances, policyholders may choose not to notify or pursue claims under their policies, due to concerns regarding the allegations (in particular, reputational damage if those allegations become widely known). Whilst we can work with you and insurers to ensure relevant confidentiality arrangements are in place (insurers are used to dealing with confidential and highly sensitive information), policyholders must give serious thought as to whether they would be prepared to provide relevant information to insurers if faced with a sensitive claim. There is little benefit to purchasing insurance that would never be used in practice, and notification/provision of information to insurers is essential if a claim is to be covered.

Directors & Officers cover

A Directors & Officers (“D&O”) policy will usually provide cover for Insured Persons (in particular, directors) in relation to EPL claims. The large majority of EPL claims will be against a company or firm. However, if a director is included as a defendant in a claim, the D&O policy will provide cover for the director’s defence costs and damages assessed against the director. If there is a claim against both the company and the director, there may need to be an allocation between covered and uncovered costs.

There are two additional key points to bear in mind:

1. A combined policy may include D&O and some other parts that provide cover to the company or entity. Do not assume that because EPL is mentioned that there is cover for the entity for EPL claims. Indeed, frequently (and increasingly) there will be no cover for the entity for EPL claims in combined policies.
2. Even cover for D&O EPL is being restricted in the current market. If this is a key cover for you (and your board), ensure you discuss that with your insurance broker.

Coronavirus

The short point is that, at present, we do not know what employment related claims will arise as a result of coronavirus. A physical injury type claim (an employee allegedly catching coronavirus because of alleged failures in Covid prevention measures at a work place) could fall to an EL policy, but the bodily injury exclusion (amongst other things) will mean there is no cover under EPL. That said, it will be interesting to see if coronavirus cases make their way into the EPL sphere. For example, will we see instances of employees making claims for discrimination because they were shielding and so not able to attend the office, which they consider means they were passed over for promotion? Or if the economic downturn leads to increased redundancies could this lead to more claims for unfair dismissal and discrimination type claims?

An important point here is to ensure that the implications of any additional Covid exclusions

are worked through. We have seen instances of insurers seeking to add Covid exclusions. Whilst they may be justified (and unavoidable) in some cases, they can have unintended consequences if drafted and/or applied too widely.

Current market

We are currently facing the hardest insurance market conditions for many years, with insurance capacity much more limited. As a result, premiums are increasing, retentions are higher, policy limits are lower, and insurance wordings are seeing increased scrutiny. EPL is one area that is particularly under pressure, meaning you may see coverage removed from current programmes or available only at significantly higher cost, if at all.

To buy or not to buy?

There are a number of points to consider when it comes to buying EPL insurance. As the cost increases in the harder market, it makes the decision whether to buy (and how much to buy) much more difficult. Our bulletin sets out some of the point to consider when reaching your buying decision. Inevitably, the bulletin can only be a summary of key points, and any specific conclusions on the purchase of EPL should be discussed in detail with your broker.

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This article was authored by members of Howden’s Legal, Technical & Claims team. The Legal, Technical & Claims team is made up of senior insurance lawyers and experienced claims professionals, and provides support on insurance claims, policy wordings and legal and regulatory developments as they impact your business. If you have any queries on the issues raised, please feel free to contact a member of the team directly.

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