

Maximize EPL Coverage: Avoid the Late Notice Trap

The number one reason insurance carriers deny coverage for Employment Practices Liability (EPL) claims is late notice. This widespread problem can usually be attributed to a simple and *correctable* cause: lack of understanding of what constitutes a claim. Many are unaware that an Equal Employment Opportunity Commission (EEOC) charge or a complaint filed with an equivalent state agency is considered a claim under most EPL policies, triggering the duty to report it promptly to the insurance carrier. Failure to do so can result in the heaviest of penalties – forfeiting coverage – as most EPL carriers require claims to be reported during the policy period in which the charge is *first made* against the insured.

Here is a typical scenario. An EEOC charge is filed in one policy period. During a *later* EPL policy period, a lawsuit evolving from that charge is brought and the matter is then submitted to the insurer for the first time. The carrier is almost certain to deny coverage for *both* the EEOC charge and the subsequent lawsuit – both otherwise covered – on the grounds that the insured had the duty to file the claim during the earlier policy period – when the EEOC charge was first filed. While the cost of an EEOC charge alone may typically not be significant, and even fall within the policy's deductible or retention, a lawsuit evolving from that charge could easily result in significant defense costs and damages.

Why Are Claims Filed Late?

No loss is a good loss, but EPL claims are especially unwelcome. EPL charges usually focus on allegations of discrimination or harassment. Whether they have merit or not, the charges are embarrassing and damaging to individuals and organizations while presenting the potential for large damages in the courts of law and public opinion. Organizations may be tempted to ignore EPL claims, or at least be quiet about them, in the hopes that they might go away – and, in fact, in many cases they *do* go away. Here lies the source of the problem. Charges are often not reported, because the organization has concluded that an EEOC or state charge is frivolous

and presents little or no exposure. Most of the time, *this assessment is correct*. However, it is for that rare situation where an initial EEOC charge evolves into a significant lawsuit that an organization buys an EPL policy in the first place. If that EEOC charge is not reported in time, all coverage related to that change will likely be forfeited, including coverage for defense costs as well as any possible settlement.

Avoiding the Trap

The first step in ensuring your organization avoids the late trap is knowing how your EPL policy defines claim and the time frame in which claims must be reported. In most EPL policies, the definition of claim includes a written demand for damages, a lawsuit or a charge of discrimination filed with the EEOC or a state agency. All of these must be reported within the time frames described in your policy. Unless you've modified your policy's claims reporting provisions, reporting every claim means *every claim* – even those which might reasonably fall within your policy's deductible or retention. Once you know your EPL policy's definition of claim, the next step is to understand your policy's reporting provisions.

Most EPL policies include two reporting time frames, *both of which have to be met*. The first time frame requires reporting the claim "as soon as practicable," and can be tailored by including language that the claim must be reported "as soon as practicable" after key personnel (e.g., the parent company's general counsel or risk manager) first become aware of the claim. This is sometimes referred to as a delayed claims trigger. The second time frame for reporting is either the end of the policy period or some defined period – 30, 60 or 90 days – after the end policy period. **Note:** the second time frame is an absolute and, if the claim is not reported within that period, a carrier will deny coverage.

Fostering a strong working relationship and an atmosphere of open communication between your legal, human resources and risk management departments will

help prevent claims from slipping through the cracks. Risk management should make sure that legal and human resources staff throughout the organization, whether centralized or decentralized, are aware of the EPL policy's definition of claim. They should insist on being notified when legal or HR receives a demand letter, a lawsuit or an EEOC charge. If branch managers are charged with handling EEOC charges, they should also be made aware that such matters are claims that must be reported under the organization's EPL policy.

Changing the Reporting Requirements

Another potential solution to the problem is treating it at the source: modifying reporting requirements. There are numerous ways that carriers are willing to reduce the potential for late notice. In some EPL policies, especially those with multi-million dollar deductibles or retentions, the policy may be modified to state that no notice is required until the risk manager or general counsel reasonably believes that the costs will exceed \$1 million, for example, or 50 percent of the policy's retention.

Another option is amending the policy's reporting provision to allow a bordereau report to be submitted to the carrier quarterly, semi-annually or, in some instances, annually. The bordereau allows the insured to submit a spreadsheet listing all of the EEOC charges filed during the reporting period and limits the amount of information that must be provided to the carrier. Providing a minimum amount of information about the charges eases some of the administrative burden for the insured and makes it easier for the insured to report all EEOC charges and thus comply with the policy's reporting provisions. The bordereau is best suited for those organizations that have a high frequency of EEOC charges filed in any given year.

A third and more radical way carriers can help you avoid the late notice trap is by deleting EEOC and state agency charges from the definition of claim. On one hand, this restricts coverage. On the other, it eliminates the possibility of a denial of coverage for a lawsuit arising out of an EEOC charge that was not reported in a timely fashion. The lawsuit would be covered, even if the EEOC charge is not reported, as long as the lawsuit is properly reported – and lawsuits generally represent a much more costly exposure.

Conclusion

The easiest way to maximize coverage under your EPL policy and avoid a coverage denial based on late notice is to gain a solid understanding of how a claim is defined under your policy and to keep in mind your policy's reporting requirements. Knowing and abiding by these two critical provisions may protect your organization from a late notice denial – an outcome that may be as unwelcome as the EPL charge itself.

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