

## 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 a discrimination complaint before a human rights commission in Canada (or an Equal Employment Opportunity Commission (EEOC) charge or a complaint filed with an equivalent state agency in the US) is considered a claim under most EPL policies, triggering the duty to report it promptly to the insurance carrier. Similarly, many do not realize that a written demand for damages, such as a request for additional pay in lieu of notice following a wrongful termination in Canada, is considered a claim under most EPL policies. Failure to notify the carrier promptly 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.

The employment claim environment may soon become more hazardous in Ontario (in keeping with legislation in other provinces) in light of recent changes to Ontario's Human Rights Code (Bill 107), anticipated to come into effect during the Spring of 2008. The changes may result in a far greater economic threat to employers, and discrimination claims may increase in frequency. The bill creates a "direct access" system, providing complainants a much more direct and expedient adjudicative system. Furthermore, Bill 107 allows individuals to bring a lawsuit for breaches of the Human Rights Code as part of another proceeding; for example, a wrongful discrimination action. This may lead to employee discrimination class action lawsuits, a powerful remedy not currently available in Ontario.

Here is a typical scenario. A demand letter is sent in one policy period. During a *later* EPL policy period, a

lawsuit evolving from that demand is brought, and the matter is then submitted to the insurer for the first time. The carrier may well deny coverage for *both* the demand letter 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 demand letter was first filed. While the cost of responding to the demand letter alone may typically not be significant, and even fall within the policy's deductible or retention, a lawsuit evolving from that demand 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 in the US usually focus on allegations of discrimination or harassment. EPL claims in Canada usually focus on wrongful termination, often including allegations of mental distress and bad faith. Whether they have merit or not, the charges/claims 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. Claims are often not reported because the organization has concluded that a termination demand, a discrimination claim before the commission, or a EEOC or state charge in the US is frivolous and presents little or no exposure. Many times, this assessment is *correct*. However, it is for that rare situation where an initial charge or demand evolves into a significant lawsuit that an organization buys an EPL policy in the first place. If that claim is not reported in time, the coverage for any damages related to that claim will likely be forfeited.

## 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 appropriate agency, court or commission. *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 administrative charge. If branch managers are assigned to handle administrative 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 and/or other claims 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 claims eases some of the administrative burden for the insured and makes it easier for the insured to report all claims and thus comply with the policy’s reporting provisions. The bordereau is best suited for those organizations that have a high frequency of low severity claims filed in any given year.

A third and more radical way carriers can help you avoid the late notice trap is by limiting the claim definition, for example by deleting notices before a human rights tribunal, and in the US, 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 a human rights tribunal or EEOC charge that was not reported in a timely fashion. The lawsuit would be covered, even if the human rights tribunal or 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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