

Eight Emerging, Evolving EPLI Exposures



Returning to office following COVID-19

After a number of stops and starts in 2021, employers are in the midst of bringing employees back to their workplaces. There are several potential COVID-19-related exposures that may emerge as organizations reopen their offices with uncertainty around the vaccination status of their workforce, including disability discrimination, emotional distress claims, wrongful terminations and retaliation, age discrimination, labor unrest, failure to protect and wrongful death.

As a best practice, employers should review their EPLI policy to assess whether it will respond to these evolving COVID-19-related issues in respect of employment matters. To assess coverage for any potential claims, EPLI policies should be reviewed for Bodily Injury/Property Damage (BI/PD) exclusions and potential carve-backs. Coverage would depend on the language used in the policy.



Cannabis and the workplace

Medical and recreational marijuana continues to be a thorny issue in the workplace following the legalization of marijuana in Canada and select U.S. states. Employers must walk a fine line between compliance with employment law protecting employee rights, a patchwork of federal, state and provincial laws that prohibit working under the influence of marijuana and their own company drug use and safety policies. EPLI policies can provide coverage for a host of accusations that may arise resulting from the intersection of cannabis and the workplace, spanning from discrimination based on a disability to wrongful dismissal allegations.



Sexual harassment

In the midst of continued worldwide focus on sexual harassment allegations in the workplace, various Canadian jurisdictions have created statutory obligations for companies to investigate and address workplace harassment complaints, and to develop and maintain programs and policies that explicitly address sexual harassment. In Ontario, for example, this came in the form of amendments to the province's Occupational Health and Safety Act (OHSA). An employer's failure to comply can result in a mandated third-party investigation and report at the company's expense, or a hefty fine. Although most EPLI policies exclude violations of the OHSA, and its associated fines and penalties, some EPLI programs will respond to provide certain indemnity and defense costs coverage in the event a company is faced with a civil lawsuit alleging harassment or sexual harassment.

Meanwhile, in the U.S., local, state and federal laws

offer a variety of prohibitions against sexual

harassment differing mostly in the type of

available damages, but also regarding mandatory

training requirements in some states. State and

local laws often provide the plaintiffs' bar with

uncapped damage and punitive damage award

potential, making it more common that these

suits are brought under state and local laws.

However, similarly complex state insurance laws

require careful analysis to ensure EPLI policies

can respond to these types of punitive and

intentional act-related awards.



Invasion of privacy

Various privacy-related torts have been recognized in recent years in Canadian jurisdictions. With the broadening of privacy rights, employers must be careful in balancing employees' reasonable expectations of privacy and, for instance, surveillance and searches or public announcements or statements involving employees.

In the U.S., there have been two significant trends

in the area of employee privacy. The first relates

to the capture of biometric information from

employees such as eye scans, fingerprints or the

use of facial recognition software. In Illinois in

particular, but also in a growing number of other

states, laws have been passed to make the

capture of such information illegal without the

written authorization of the employee. Many

employee class actions have been brought in

Illinois under its Biometric Information Protection

Act (BIPA). The COVID-19 pandemic has been

another area of significant employee privacy

concern. Both contact tracing as a result of an

infection and the growing push for employers to

learn whether employees have obtained the

COVID-19 vaccine have increased the likelihood of

privacy-related lawsuits in this area as well.

Many EPLI policies provide some measure of

coverage for invasion of privacy claims, although

the extent of coverage varies among carriers and

may differ depending on whether the insured is a

public or private company. Recently, given the

rise in BIPA-related lawsuits, some carriers have

begun to actively look to either underwrite or

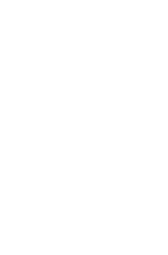
exclude coverage for biometric

information-related matters.



Evolving grounds of discrimination

Traditionally, discrimination claims based on race, ethnicity and age have been commonly covered under EPLI policies, but insurance and legal practitioners are expecting to see an uptick in litigation in more recent grounds of human rights discrimination as well. In recent years, legislation has evolved to both recognize expanding rights such as LGBTQ+ rights and gender identity, as well as realities such as work-life balance. It is vital for EPLI policies to respond in the event of discrimination based on, among other things, sexual orientation, transgender status, or gender dysphoria. Equally important is coverage for other grounds of discrimination such as family status (expressly recognized by the Canadian Human Rights Tribunal). EPLI policies typically provide broad coverage in this regard, which in most cases will extend to cover claims stemming from these novel bases of discrimination.



Employee termination

Termination of an employee can come with potential risk and litigation if not conducted carefully. In Canada, claims for wrongful dismissal are generally accompanied by disputes over the amount of pay-in-lieu of notice to which a terminated employee is entitled.

Notably, common law notice periods in Canada

have recently increased to an upper threshold of

26 months. In the U.S., wrongful termination

claims can take many forms even with its

supposed employment at-will nature of the

employee relationship.

The Canadian EPLI market now offers coverage

by some carriers, subject to terms and

conditions, for some of the wages ultimately

awarded by a court that are over and above the

statutory minimums required by legislation, or

the amount that is offered to the employee at or

after the time of termination.

In the U.S., wrongful termination is broadly

covered because the damages are much less

formulaic and statutory based than in Canada.

Therefore, wrongful termination claims are a

major source of exposure addressed by EPLI in

the U.S.



Dependent contractors

Dependent contractors find themselves somewhere on the job classification spectrum between employees and independent contractors. Canadian courts have generally classified a dependent contractor as an individual who works for themselves but provides consistent and regular services to one or a limited number of organizations. As a result, that individual is entitled to many of the same rights as an employee. Traditionally, EPLI policies did not extend to cover individuals in these positions. However, the Canada insurance market has begun to move in a favorable direction for insureds, with policies now providing coverage for claims involving dependent contractors.

In the U.S., the advent of the gig economy has

resulted in a blurring of the spectrum between

independent contractors and employees as well.

In response, employment laws have tended to

make it easier for workers who have entered

into clear agreements stating they are not

employees of a particular organization to sue as

if they were employees. As a result, brokers have

worked diligently with the insurance market to

seek to expand coverage treating employment

claims for otherwise covered wrongful acts

brought by these non-traditional employees to

be treated as employment claims covered under

EPLI policies. That is, as long as the worker is

claiming to be an employee, which is typically a

requirement for the plaintiff to allege to bring a

claim under most U.S. employment laws.



Wage and hour claims

"Wage and hour" claims have increased in both frequency and severity over the past few years. These claims are frequently brought as class action lawsuits, with large groups of employees seeking millions of dollars in damages for matters such as unpaid wages, unpaid overtime and job misclassification leading to wages or other benefits owed. To address this exposure, coverage for lawsuits related to employee wages may be available for larger U.S. and Canadian policyholders who may face significant losses in a wage and hour class action lawsuit. This is typically priced much higher than traditional EPLI insurance. The cost of this coverage has recently decreased, but remains relatively high, as does the retention, due to litigation trends in this area.