COVID-19: INSURANCE COVERAGE FOR PANDEMIC-RELATED WORKPLACE AND EMPLOYMENT PRACTICES CLAIMS

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While legislative initiatives are being proposed to shield businesses from various pandemic-related liabilities, the extent to which such measures, if ultimately passed, will protect employers from workplace and employment-related claims is uncertain.[1]

There have already been, for example, several well-publicized claims filed against employers based on alleged failures to put in place adequate pandemic-related workplace protections. Given this uncertain landscape, employers should not overlook their Employment Practices Liability (EPL) policies as important potential sources of protection against certain pandemic-related workplace and employment practices claims. While many EPL policies may not respond to claims for injury or disease arising from workplace contraction of COVID-19, they may provide valuable coverage, including a defense, for a variety of other pandemic-related workplace and employment claims, such as alleged invasion of privacy, failure or refusal to create or enforce workplace or employment policies, retaliation, wrongful discipline or demotion, negligent supervision or training, and alleged discrimination in connection with employee recall decisions, accommodation requests, testing, use of personal protective equipment, distancing, facility disinfection, shift and break staggering, and various other matters, discussed below.

COVERAGE OVERVIEW

While there is no industry-standard EPL policy form, the most common EPL policies tend to have similar core grants of coverage. EPL policies are generally written on a claims-made basis, and coverage is triggered by the policyholder's receipt of a “claim” alleging a “wrongful employment practice” (or similar terminology).

A “wrongful employment practice” is often defined broadly to include (in addition to discrimination, harassment, and retaliation) concepts such as invasion of privacy, failure or refusal to create or enforce adequate workplace or employment policies, wrongful discipline or demotion, and negligent supervision or training. Many of these broad terms are undefined in the policy, making them susceptible to ambiguity and, because they are part of the basic coverage grant, to being construed broadly in favor of the employer-policyholder.

For example:

- An employee taking issue with screening, testing, or contact tracing requirements may be alleging covered invasion of privacy;[2]

- Allegations that an employer failed to implement or follow appropriate pandemic-related workplace guidelines may allege a failure to create or implement workplace policies;[3]
- Claims involving employees who refuse to follow workplace rules or to work under certain conditions may be covered as wrongful discharge or discipline or constructive discharge;
- Claims alleging retaliation against an employee for complaining about or reporting perceived inadequacies in workplace safety measures may be covered;[4] and Claims asserting discrimination against an employee, or group of employees, when deciding which employees to recall to work may be covered. EPL policies also typically define a covered "loss" to include defense costs and monetary damages, judgments, settlements, and back and front pay, but sometimes purport to exclude the costs of remedial and preventative measures and the cost of modifying or adapting the workplace or making accommodations. Accordingly, while settlements, judgments, and defense costs may be covered in some of the examples above, the costs of complying with certain non-monetary relief may not be covered.[5]

KEY EXCLUSIONS AND THEIR LIMITATIONS

EPL policies typically exclude coverage for bodily injury, sickness, disease, or death. Thus, claims involving workplace contraction of COVID-19 may be excluded. Importantly, however, some of the bodily injury exclusions found in EPL policies do not extend to, or expressly carve out, emotional distress and mental anguish. Accordingly, claims alleging emotional distress or mental anguish caused by pandemic response-related workplace conditions may be covered.

Many EPL policies do not contain any form of virus or communicable disease exclusion, even though such exclusions are found in other lines of coverage. However, some EPL policies contain various forms of "pollution" exclusions. The wording of these exclusion can vary considerably. Whether a pollution exclusion can successfully be invoked by insurers in response to pandemic-related workplace and employment claims may depend upon various issues arising from the specific wording of the exclusion and applicable law, including: (i) whether the policy's definition of "pollutant" includes biological organisms, such bacteria or viruses; (ii) whether the virus might otherwise be considered an "irritant or contaminant" under applicable law construing exclusions; and (iii) whether the particular underlying claim bears a sufficient causal connection, under the specific language of the exclusion (e.g., whether it "arises from" or is "related to" or "in any way involves"), to a "release or escape" of, or a requirement to test or monitor for, the pandemic.[6]

NOTICE AND RENEWAL CONSIDERATIONS

As discussed above, EPL policies are typically written on a claims-made basis. A "claim" is typically defined to include a written demand, in addition to the commencement of a civil, judicial, administrative, or regulatory proceeding. Thus, receipt of a demand letter or other writing alleging a covered claim may be sufficient to trigger a notice obligation under the policy. A failure to give notice within the period required under a claim-made policy can defeat coverage, without regard to whether the insurer is prejudiced.

Additionally, EPL policies often have provisions governing so-called "notice of circumstances" (or similar terms). Under these provisions, policyholders can, in the absence of a "claim" having been asserted, give the insurer notice of the happening of circumstances from which a claim may arise in the future and, thereby, lock in coverage under the policy then in effect. These provisions can operate in tandem with exclusions directed at

claims arising out of circumstances of which the policyholder was previously aware to divest coverage. Even though characterized as permissive by the current policy, a failure to give notice of circumstances might leave a policyholder without coverage in the future, if a claim is later asserted during a subsequent policy with a prior known circumstances exclusion. A similar problem can arise if a policyholder switches insurers and the new insurer seeks to impose a new retroactive date.

Notice of circumstances provisions are also important to consider in situations where an insurer seeks to impose a new exclusion at renewal. As discussed above, currently, many EPL policies do not contain virus or communicable disease exclusions, even though various forms of such exclusions are found in other lines of coverage, and many pollution exclusions may not cover pandemic-related claims. Given the current circumstances, insurers may seek to add or broaden exclusions within EPL policies at upcoming renewals. Policyholders facing the imposition of or broadening of exclusions at renewal should consider using a notice of circumstance where appropriate to lock-in coverage under their expiring policy.

CONCLUSION

In the wake of uncertain future liability for pandemic-related workplace and employment claims, employers should be aware that their EPL policies are a potential source of protection against such claims. Employers should be familiar with their policies, promptly notify insurers in the event a potentially covered claim or circumstance arises, be attentive to such policies in their renewal negotiations, and be prepared to seek counsel in the event of a coverage dispute or other questions.

FOOTNOTES

[1] *See, e.g., Rural Community Workers Alliance v. Smithfield Foods, Inc.*, No. 5:20-CV-06063-DGK (W.D. Mo. 2020); Benjamin v. JBS S.A., No. 200500370 (Pa. Ct. Com. Pls. Phila. Cty. 2020); *Evans v. Wal-Mart Stores, Inc.*, No. 2020IL003938 (Ill. Cir. Ct. Cook Cty. 2020).

[2] The definition of covered conduct under an EPL policy may include claims for “invasion of privacy” of an employee. *See, e.g., Gauntlett v. Ill. Union Ins. Co.*, No. 5:cv 11-00455-EJD, 2011 WL 5191808, at *7 (N.D. Cal. 1 November 2011) (acknowledging that an invasion of privacy claim may be covered under an EPL policy).

[3] Courts have held that claims alleging that the employer failed to implement or adhere to adequate policies, practices, and procedures are covered under EPL policies. *See, e.g., KidsPeace Corp. v. Lexington Ins. Co.*, No. 07-1864, 2009 WL 10678280, at *2 (“Finally, 'employment practices wrongful acts' is defined as including employment discrimination, employment harassment, retaliation and workplace torts—which includes negligent training and failure to enforce corporate policies and procedures.”).

[4] Courts routinely hold that claims where an employee alleges retaliation or wrongful discharge for reporting inadequate procedures or regulatory non-compliance are covered under EPL policies. *See, e.g., First Bancshares, Inc. v. St. Paul Mercury Ins. Co.*, No. 10-3370-CV-S-RED, 2011 WL 4352551, at *3–5 (W.D. Mo. 16 September 2011) (holding that claim alleging that the underlying plaintiff's influence was diminished in retaliation for reporting unethical behavior to the employer's board was covered claim under EPL policy).

[5] The coverage afforded for discrimination in EPL policies can vary significantly. Some policies require

discrimination against a protected class, as that term is defined in state and federal civil rights statutes. *See, e.g., Douglas Autotech Corp. v. Twin City Fire Ins. Co.*, No. 1:06-cv-448, 2007 WL 2406930, at *1, *3 (W.D. Mich. 20 August 2007) (holding that the underlying plaintiff's age discrimination claim was covered under EPL policy); *SNL Fin., LLC v. Philadelphia Indem. Ins. Co.*, No. 3:09-cv-00010, 2009 WL 3150870, at *3–5 (W.D. Va. 30 September 2009) (holding that claim alleging disability discrimination was covered under EPL policy). Other EPL policies, however, require only that the alleged discrimination be against a member of an allegedly legally protected class, without purporting to limit the legal authority defining the class.

[6] Courts have taken divergent views regarding whether biological organisms, bacteria, or viruses constitute "pollutants" falling within the scope of pollution exclusions, but the majority of courts hold that exposure to these substances does not fall within the scope of the pollution exclusion. *See, e.g., Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 13 P.3d 785, 788–92 (Ariz. Ct. App. 2000) (holding that bacteria and fecal coliform in glass of water served to golfer did not constitute a pollutant because it would not read the pollution exclusion so broadly as to include bacteria); *Westport Ins. Corp. v. VN Hotel Corp., LLC*, 761 F. Supp. 2d 1337, 1343–44 (M.D. Fla. 2010) (holding that pollution exclusion did not apply to bar coverage for claims that hotel guests contracted Legionnaire's disease from bacteria in the hotel spa because if pollutant was read broadly enough to include bacteria there need not be a separate bacteria exclusion); *Ramos v. Charter Oak Ins. Co.*, 871 N.W.2d 866, 866 (Wis. Ct. App. 2015) (holding that bacteria expelled from a foundry was not covered by a pollution exclusion). But *see E. Quincy Servs. Dist. v. Continental Ins. Co.*, 864 F. Supp. 976, 979 (E.D. Cal. 1994) (holding that bacteria and fecal coliform that leaked from a septic system and contaminated the surface and ground water of the underlying plaintiff's property fell within the scope of the pollution exclusion as a contaminant and migrated from the policyholder's lot to another's lot).

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