



Management Liability

Management Liability Claims Scenarios

Risk is complicated and unpredictable, especially for organizational leaders facing challenges that include new and increasingly complex exposures. Epack 3®, our modular management liability policy, can be customized for a wide range of businesses and nonprofit organizations with optional coverage parts that include Directors and Officers Liability, Employment Practices Liability, Crime and more. When claims occur, our experienced Claims professionals understand the nuances of management liability and use industry-leading technical expertise to deliver outstanding customer service.

Employment Practices Liability Insurance (EPLI)

Disability Discrimination, Retaliation and Wrongful Termination

The plaintiff, who worked as a fabricator for an industrial supply company, reported stomach pains that led to a hernia diagnosis and required surgery. Through a text message, the plaintiff informed his employer of the need for surgery and his doctor's recommendation that he remain on medical leave for six weeks following the surgery, but he did not provide any supporting documentation. Two weeks after the plaintiff returned to work, the employer fired him based on performance issues, citing multiple verbal warnings leading up to the termination. The plaintiff then filed a complaint alleging disability discrimination, retaliation and wrongful termination.

While the employer will be able to provide testimony from the plaintiff's supervisors regarding his performance deficiencies, the employer has no written documentation to indicate that it informed the plaintiff about these deficiencies prior to the surgery. The risk in presenting this claim to a jury is that the jury might conclude the plaintiff was fired in retaliation for having surgery and missing work – not for performance reasons.

Key Considerations

Documentation is critical to the successful defense of an EPL claim. Small business employers should counsel managers to document performance issues at the time they arise and to provide employees with a copy of the documentation. Documentation helps an employer avoid a "he said/she said" scenario that might lead a jury to side with the employee when there is a dispute about whether an employee's protected activity was a factor in disciplinary or termination decisions by the employer.

Sexual Harassment and Retaliation

The claimant managed supply chain issues for a retailer. Due to performance issues that included making the same error in six consecutive weekly reports and making purchasing errors that caused the employer to incur losses of several hundred thousand dollars, the employer scheduled a meeting to put the claimant on a performance improvement plan. The evening before the meeting, the claimant emailed the owner accusing his supervisor of making inappropriate comments in the workplace. The employer acknowledged the complaints about the supervisor, but did not meet with the claimant, provide the claimant any

written documentation of his performance deficiencies, or put the claimant on a performance improvement plan. Instead, the employer investigated and confirmed the substance of the allegations against the supervisor, but concluded that the supervisor's comments did not create a hostile work environment. Two months later, the employer fired the claimant for poor performance and offered a severance package worth four months' salary. The claimant rejected the severance offer and retained a lawyer, who sent a demand letter to the employer alleging claims for unlawful sexual harassment and retaliation. The claimant and the employer agreed to mediate the claims prior to the claimant filing a lawsuit. The mediation resulted in a settlement equal to one year's salary.

Key Considerations

- An employee who is not the target of the inappropriate comments may still allege a hostile work environment based on sexually inappropriate comments in the workplace.
- While the employer had the testimony from its managers and documentation to demonstrate the claimant's errors, it did not provide any written warnings or documentation to the claimant prior to his termination.

Age Discrimination

The plaintiff, a regional sales manager, age 62, applied for a position as National Sales Manager. The company promoted a younger employee, age 52, to the position. Both applicants had a similar record of achieving sales targets for their respective regions. Following the decision to hire the younger employee, the company CEO called the plaintiff to break the news to him. Following a lengthy conversation, the CEO informed the plaintiff that if he was 55, he would have been hired into the position. Unbeknownst to the CEO, the plaintiff recorded the conversation and then sued the company, alleging that but for his age, he would have been hired and promoted to the open position. The company contended it hired the more qualified person for the position.

Sexual Harassment

A female plaintiff was employed in a retail sales position for a company specializing in sporting goods and outdoor equipment. Floor sales employees, including the plaintiff, were equipped with communications devices that allowed them to speak to other sales employees and to their managers. The plaintiff alleged that the male employees routinely discussed and "rated" the appearance of female customers, and maintained that she was forced to work in a hostile environment because she was subjected to the inappropriate comments by her male coworkers. The company contended that the plaintiff never mentioned any inappropriate conduct until after she was terminated for poor performance and absenteeism.

Key Considerations

- EPL was developed by the insurance industry in response to the explosion in employment claims.
- EPL risks include wrongful termination, harassment, discrimination, retaliation, etc.
- Employment practices exposure has evolved into a heightened risk to companies of all sizes and insurance segments.

Fiduciary Liability

Employee: Employees sued fiduciaries alleging wrongful elimination of a profitable investment option and improper selection of another. Employees also alleged that fiduciaries failed to monitor the actions of the outside investment manager.

Government: Department of Labor sued a plan trustee for investing plan assets in an off-shore investment fund. The Department of Labor lawsuit sought to recover the losses from the plan trustee.

Key Considerations

- Fiduciary coverage helps protect fiduciaries overseeing benefits provided or promised to employees.
- Law governing fiduciaries continues to develop, making the litigation risk to fiduciaries heightened.
- Fiduciary claims often come from employees, but an insured could also be up against the government if there is an ERISA violation.

Directors & Officers (D&O)

Shareholder claim: A construction company experienced a bad business year due to the economic downturn. Minority shareholders filed suit against the board of directors. The shareholder alleged that the board breached its duty to the shareholders by mismanaging the business and misrepresenting the state of the industry, which was material to the minority shareholders' decision to invest.

Competitor claim: A marketing company lost employees to a competitor. The employees allegedly took sales lists and used them at their new company. The marketing company sued their competitor and their former employees alleging the misappropriation of trade secrets.

Key Considerations

- D&O insurance was initially designed to protect the directors, officers and executives running the company from personal liability. Over time, the coverage has expanded beyond that protection.
- D&O claims can come from a variety of sources, but they typically arise from the management of the entity. A D&O claim can be made against a company even if those running it think they did nothing wrong.
- The legal and business environment in which companies and those who run them operate is complex and nuanced. D&O insurance can provide protection for individuals and for disputes companies face.

Crime

Vendor Invoice Scheme: A data center manager at a publicly traded technology company established a shell company with a fictitious name for the purpose of submitting invoices. Over a five-year period, the company paid more than \$2,200,000 to this fictitious vendor.

Social Engineering: A private pulp and paper company received a fraudulent email, purportedly from one of its vendors, sharing a new bank account and requesting that all future payments be made there. As a result, five payments were sent to the bad actor's account and the company suffered a \$650,000 loss.

Theft of Funds: A private industrial services company discovered that its controller stole \$380,000 and that, for nine years, she had used the company's bank account to pay rent for her personal residence.

Key Considerations

- Businesses of all sizes are constantly at risk of fraud, and these schemes tend to be elaborate, difficult to uncover and very expensive.
- Crime coverage allows organizations to transfer this exposure off their balance sheet.
- Crime claims come in many forms, but the most common scenarios are employee theft and social engineering schemes perpetrated by third parties.

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