

EPL Insurance

Like other lines of insurance, the employment practices liability (EPL) insurance market has hardened. As such, the first half of 2022 saw the majority of insureds experience rate increases. The extent of these rate increases varied based on sector, location, potential exposures and prior losses. Most policyholders with good claims history encountered moderate rate increases, ranging between 5%-15%, according to industry data. Further, retention increases have become common across the board, with added pressure on primary retentions. As new insurers emerge for excess layers of EPL coverage, market capacity has somewhat stabilized. Yet, a lack of competition

among primary and lower-excess layers—particularly as it pertains to riskier industries (e.g., health care, retail, hospitality and leisure) and states (e.g., California, Illinois, Florida, New York and Texas)—has created ongoing capacity challenges for some insureds. Looking forward, first-time EPL insurance buyers may experience greater capacity difficulties as insurers focus on maintaining profitability among their existing customers. Overall, rate increases and coverage limitations will likely persist for high-risk policyholders for the foreseeable future.

Developments and Trends to Watch

Pandemic-related claims—The COVID-19 pandemic forced many businesses to make workplace changes. With these changes, legal action against employers and related EPL claims followed. According to law firm Littler Mendelson, more than 5,400 pandemic-related employment lawsuits were filed between March 2020 and March 2022. Common concerns listed in these lawsuits included claims that employers failed to make reasonable accommodations for employees amid return-to-office plans, as well as allegations that employees faced workplace discrimination and adverse employment outcomes after opting out of COVID-19 vaccination requirements for health or religious reasons. As the pandemic continues, these issues are expected to remain top of mind for both employers and EPL underwriters.

Social movements—The #MeToo movement has empowered employees to call out inappropriate workplace conduct, contributing to a substantial rise in sexual assault and sexual harassment lawsuits against employers since 2017, according to the U.S. Equal Employment Opportunity Commission (EEOC). Amid this trend, the Biden administration signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act into law on March 3, 2022. This legislation permits employees who come forward with sexual assault or sexual harassment allegations the option to take such claims to court, even if they had previously agreed to arbitrate these disputes before

the claims arose. Such legislation has the potential to prompt further employment litigation and related EPL claims.

Retaliation concerns—Retaliation is defined as an employer taking inappropriate actions against an employee for exercising their workplace rights. According to the EEOC, retaliation has repeatedly reigned as the top cause of employment litigation and associated EPL claims in the past few years. In fact, more than half of all employment charges filed with the EEOC involve retaliation. Taking a closer look at these charges, Advisen's loss database shows that allegations of retaliation associated with racial discrimination and harassment claims have the highest median severity at \$185,000. While all industries are at risk of experiencing retaliation losses, the public administration sector accounts for more than one-third (37%) of such losses. contribute to increased climate change litigation and subsequent D&O claims for impacted companies.

Biometric privacy exclusions—A growing number of employers are using technology that retains biometric identifiers from their employees (e.g., fingerprints and facial geometry) for identification and access control purposes. However, without proper precautions in place, collecting such identifiers could threaten employees' privacy, potentially leading to employment litigation and associated EPL claims. Compounding concerns, EPL insurers are increasingly excluding or capping their exposure to claims involving biometric privacy.

Tips for Insurance Buyers

- Ensure your employee handbook and workplace policies include language on discrimination, harassment and retaliation. Document all situations that result in employee termination.

- Implement effective sexual harassment prevention, reporting and response measures.

- Establish proper workplace protocols regarding the protection of employees' biometric identifiers.