

2023 EPL Insurance Midyear

Market Outlook

Due to difficult segment conditions, most employment practices liability (EPL) insurance policyholders experienced rate jumps throughout 2022. These rate increases varied based on sector, location, exposures and prior losses. In the first half of 2023, modest rate hikes have become the norm, with premium pricing rising by between 3% and 7% during the first quarter of the year, according to industry data. Fortunately, capacity and underwriting standards have largely remained stable across the market. In light of claim frequency and severity falling below initial projections so far this year, most EPL carriers have also resumed writing new business. Yet, it's important to note that policyholders with poor loss history or operating in certain states (e.g., California) and industries (e.g., health care, hospitality, education and retail) have continued to face more substantial rate hikes and coverage restrictions. These challenges will likely persist for high-risk insureds for the foreseeable future.

Developments and Trends to Watch

- **Increased regulatory scrutiny**—The U.S. Equal Employment Opportunity Commission (EEOC) has implemented several regulatory initiatives to help fight discrimination in the employment landscape over the past few years. In fiscal year 2022, the EEOC resolved more than 65,000 discrimination charges and obtained over \$513 million in monetary benefits for those targeted by such discrimination, representing an increase from the previous year's findings. Looking ahead, the EEOC shared in its proposed Strategic Enforcement Plan for fiscal years 2023-27 that it will be prioritizing subject matters such as eliminating barriers in recruitment and hiring; protecting vulnerable workers in underserved communities from employment discrimination; addressing emerging and developing issues, including artificial intelligence (AI); advancing equal pay for all workers; preserving access to the legal system; and preventing and remedying systemic discrimination. These initiatives could pave the way for additional litigation against businesses and associated EPL exposures.
- **Marijuana legalization consideration**—Although marijuana remains illegal at the federal level, many states have begun legalizing the substance. Currently, 38 states have legalized medical marijuana, whereas 23 states have legalized recreational marijuana. Maryland is the latest state to adopt new marijuana laws, legalizing recreational use of the substance among adults 21 and older as of July 1, 2023. Such evolving legislation has created numerous challenges for businesses across industry lines, especially regarding EPL exposures. For instance, some states have enacted statutes that restrict employers' abilities to conduct drug tests for marijuana; others have introduced laws prohibiting employers from refusing to hire or taking adverse action against workers who use the substance recreationally while off-duty. As this regulatory landscape continues to shift, businesses that fail to maintain compliance could face an increase in EPL claims.
- **AI-related concerns**—AI systems can help advertise companies' open positions, analyze resumes, test applicants during the hiring process and identify top-performing employees for promotion opportunities. According to industry research, more than one-third (35%) of businesses utilize AI systems. While these systems offer various benefits, such technology may also pose EPL exposures. Specifically, AI systems—although intended to provide impartial results—may contribute to discriminatory employment decisions if the algorithms entered into these systems are biased against specific groups. Furthermore, the EEOC issued new guidance in May 2023 stating that businesses should comply with Title VII of the Civil Rights Act of 1964—the law that prohibits employment discrimination based on protected characteristics—when using AI systems during the hiring process, thus compounding related EPL exposures.

Tips for Insurance Buyers

- Assess your employee handbook and related policies. Make sure this documentation includes language on discrimination, harassment and retaliation.
- Review state-specific legislation regarding marijuana legalization. Revise workplace policies as needed to comply with such laws.
- Evaluate the algorithms for any AI systems utilized within recruitment and hiring processes to prevent discriminatory employment decisions and ensure compliance with applicable federal and EEOC guidance.

