



Employment Practices Liability - How Can You Protect Yourself?

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Employment Practices Liability, or EPL, arises from an actual or alleged wrongful act against a third party (usually an employee, prospective employee, or business associate), as a result of the practices of a corporation and/or its employees. These claims may include wrongful termination, sexual harassment, discrimination, wrongful discipline, breach of an actual or implied employment contract, invasion of privacy, defamation, negligent hiring, training, etc.

The advent of employment practices litigation has cost employers millions of dollars in defense and settlement in just the last decade. There does not seem to be an end in sight, and in fact, successful litigation has expanded to include objectionable actions by vendors, business invitees, and even acquaintances. While laws like the Americans with Disabilities Act, The Family Medical Leave Act, The Civil Rights Act of 1991, etc., ensure a fair workplace for the employee, they have the effect of increasing the employer's exposure to litigation. Faced with these exposures, every business should develop an efficient Employment Practices program to protect themselves, their employees, and their assets. This program should address The Hiring Process, Employee Orientation and Documentation, Employee Evaluation and Discipline, Termination Procedures, and a Vendor Compliance Program.

Each component warrants some discussion. Many suits originate in the hiring process. Job applications should be reviewed to make sure no questions are asked which may be fuel to an ADA or discrimination suit. Applications should include a disclaimer stating that the application is not an employment contract. The applicant should sign an authorization and release for information, as well as a verification that all statements are true, and there should be an EEO statement included. While interviewing, candidates should not be asked about any "protected traits", including sexual orientation, marriage status, ethnic background, age, etc. Many companies are utilizing pre-employment testing for a variety of reasons. If you choose to do pre-employment testing, make sure that no tests are discriminatory, and that each test is validated, i.e. that it relates to the skills necessary to perform the job applied for. If drug and alcohol testing is conducted, make sure that the integrity of the chain of custody of each sample cannot be compromised.

In terms of hiring documentation, make sure that an offer letter is provided, spelling out succinctly what the terms of the employment are, and what is expected of both parties.



Avoid employment contracts, and make sure the employee knows that employment is "at will" if applicable. The next step is Employee Orientation and Documentation. Whenever possible, use disclaimers, and use simple understandable language. Include wording that policies are subject to review and modification; make sure policies are consistent; circulate policies, and get signatures from employees that the manuals, policies, etc., have been received. It is critical to follow policies in a non-discriminatory manner.

When developing the employee manual or policies, you should consider including sexual and other harassment policies, and a policy regarding disclosure of Confidential Information. Specific work rules should be clearly spelled out, as well as the discipline program in the event policies are breached by the employee. You should avoid completely any statements that termination must be based on just cause. If you choose to institute a progressive discipline policy, use disclaiming language that allows you some latitude in the administration. Don't use "probationary" terminology; it is preferable to use "trial" or "training" period when referring to the first few weeks or months of employment. If you choose to include a summary of your benefit plans, make sure you make it clear that this is subject to change at any time.

An area that has received special attention is E-mail. It is critical that any business that uses internal and external e-mail develop and circulate an e-mail policy. Employees should be aware that inappropriate information, language, and comments will not be tolerated, and may result in disciplinary action.

In regard to Employee Evaluation and Discipline, be objective, honest, goal oriented, and do it in writing. Have the employee sign all reviews, and disciplinary statements. Use job descriptions where possible, and above all, maintain all disciplinary records. Since so much litigation centers on wrongful termination, termination procedures warrant special attention. A checklist for termination procedures should be strictly adhered to, outlining all the steps that should be taken, and maintained in a central file. A termination letter should be developed clearly spelling out the date of termination, any benefits or income due the employee, and preferably this should be signed. All documentation should be maintained. Any area that is often ignored is the concept of employment practices claims arising out of the action of third parties. A "loose cannon" vendor or business invitee can create the same problems as a manager, supervisor, officer, or employee. Make it clear to vendors, clients, and business invitees that certain behavior, language, and actions are not acceptable.

Even if you have taken all the right steps in your Human Resources program, you may still be vulnerable to costly litigation. Defending a suit, albeit a groundless one, can cost a company tens of thousands of dollars in defense. In order to mitigate that expense, we suggest that you consider insurance coverage for these exposures. There are a number of insurance products that you can consider to further insulate your assets. Traditionally, Directors and Officers' liability policies have provided this coverage for the wrongful acts of the directors and officers, and some can be amended to include coverage for the entity also. Separate Employment Related Practices policies are available, at surprisingly competitive premiums. Please contact us to review your employment practices exposures, and discuss a comprehensive risk management program for your company.



What makes you different? For most of us, if you don't know about a particular topic - research and ask. I play a different role in advising my clients. I try to educate constantly, be available to answer questions which means staying engaged with clients managing their risk and insurance program. This means staying on top of my game and keeping up with the changing landscape that can/does impact us.

Who's looking out for you? I am. As a NJ Small Business enterprise, your commitment to the growth throughout the state is seen first hand. The intrastate commerce generated helps more than 1,000,000 small business firms in the State of NJ alone. Our commitment to small business is achieved through working relationships with local supply vendors and IT consultants. All together for the success of small business.

Who is ISSI? We are a 15 year proud Edison NJ headquartered professional insurance firm regionally advising the insurance and risk needs of clients. Call me today for a complete on-site business consultation to see if we can help you purchase the right insurance at the lowest cost.

For your free consultation please call me today. You owe it your self, the longevity of your business and to the loyalty and respect of your employees to have a professional insurance and risk management firm handling all of the insurance and risk advising.

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