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The Value of Aligning Diversity, Equity, and Inclusion With Your Employment Practices Liability Insurance



Sherman & Howard

The Value of Aligning Diversity, Equity and Inclusion with Your Employment Practices

Liability Insurance

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Agenda

- ▼ Intro to Employment Practices Liability Insurance (“EPLI”).
- ▼ Diversity, Equity & Inclusion Basics.
- ▼ Diversity, Equity & Inclusion Checklist.
- ▼ EPLI Checklist.
- ▼ Advantages to Aligning DE&I with EPLI.

Intro to EPLI

- ▼ Origin and Evolution of EPLI.
 - ❖ Civil Rights Act of 1991.
- ▼ State-law Variations.
 - ❖ Public policy affecting indemnification for intentional acts.
 - ❖ Public policy affecting indemnification for punitive damages.

Intro to EPLI

- ▶ California Insurance Code § 533: “An insurer is not liable for a loss caused by the wilful [sic] act of the insured”
- ▶ Other states’ court-interpretations of public policy:
 - ❖ No coverage: Delaware, Florida, Georgia, Idaho, Indiana, Illinois, Louisiana, Maryland, New York, Ohio, and Texas.¹
 - ❖ Possible coverage: Alabama, Arizona, Iowa, Kansas, Mississippi, Missouri, Montana, New Mexico, South Carolina, Vermont, Wisconsin, West Virginia, and Wyoming.²

^{1, 2} James Publishing, Inc., *Litigating Employment Discrimination Cases*, § 12:61.1 (2020 ed.) (collecting cases).

Intro to EPLI

- ▼ Courts will also favor providing compensation for victims and will consider the express terms of the insurance agreement.
- ▼ Solo Cup Co. v. Federal Insurance Co., 619 F.2d 1178 (7th Cir. 1980).

Intro to EPLI

▼ Take-aways:

- ❖ EPLI has evolved over time and continues to evolve.
- ❖ While there may be a nation-wide market for purchasing insurance coverage, enforcement of the written policy is most often a matter of state law, and the coverage of various kinds of claims may vary among the states.

Diversity, Equity & Inclusion Basics

- ▼ Under U.S.-law, employers with more than 15 employees may not discriminate “because of” race, color, national origin, sex, or religion.
 - ❖ “Title VII” of the Civil Rights Act of 1964.
- ▼ See also 42 USC 1981, ADEA, ADA, GINA, USERRA, etc.

Diversity, Equity & Inclusion Basics

- ▼ Typical claims under Title VII include:
 - ❖ Disparate treatment
 - Including sex harassment, quid-pro-quo discrimination.
 - ❖ Disparate impact
 - Demonstration (statistical or otherwise) that an employment practice causes significant disparate impact, and, if the employer shows the practice is job-related and consistent with business necessity, that an alternative practice would meet the business need and avoid the disparate impact.
 - ❖ Pattern or Practice
 - Demonstration (statistical or otherwise) that discrimination is standard operating procedure, rather than an unusual event, for the employer.

Diversity, Equity & Inclusion Basics

- ▼ Discriminatory “motive” is not necessary even for a disparate treatment claim, so long as the employment action is “because of” the Title VII-protected characteristic.
 - ❖ Bostock v. Clayton County, 590 U.S. _____ (2020).

Diversity, Equity & Inclusion Basics

▼ Types of DE&I Programs:

- ❖ Increased range of recruitment.
- ❖ Mansfield Rule.
- ❖ DE&I sensitivity training.
- ❖ Employee resource groups.
- ❖ Mentoring and professional development programs.
- ❖ New management positions dedicated to DE&I.
- ❖ Contractor preference programs.
- ❖ Executive Order 11246 Affirmative Action Plans.
- ❖ EEOC-approved, voluntary affirmative action plans.

Diversity, Equity & Inclusion Basics

- ▶ A word about EEOC-approved voluntary affirm. action plans:¹
 - ❖ Reasonable self analysis: “to determine whether [your] employment practices do, or tend to, exclude, disadvantage, restrict, or result in adverse impact or disparate treatment . . .” and if so, why.
 - ❖ A reasonable basis to conclude action is appropriate.
EEOC: “This reasonable basis exists without any admission or formal finding” of a violation of Title VII.
 - ❖ Reasonable action: appropriate to findings of the analysis; may include “goals and timetables;” may include new opportunities for members of excluded groups.

¹29 C.F.R. Part 1608.

DE&I Checklist

- ▶ Consider whether you want an EEOC-approved voluntary program. If so, you must conduct a self analysis and get a written report.
- ▶ In the absence of a voluntary or required affirmative action plan, do not make an employment decision “because of” race, color, national origin, sex, or religion. (Also, disability, age (over 40), genetic information, etc.)

DE&I Checklist

- ▼ Do not rely on customer preference.
- ▼ Do scrub the organization of barriers to hiring, retention, and advancement.
 - ❖ Word-of-mouth recruitment.
 - ❖ Subjective criteria (team, culture, fit).
 - ❖ Corporate structure and job descriptions.
- ▼ Train, train, train.
 - ❖ Rudin v. Lincoln Land Comm. College, 420 F.3d 712 (7th Cir. 2005).

Diversity, Equity & Inclusion Basics

▼ Consider Wells Fargo:

- ❖ Created a C-suite position to lead DE&I;
- ❖ Evaluated executives based on ability to increase diversity;
- ❖ Created mentoring for diverse future leaders;
- ❖ Required that 50% of candidates interviewed for high earning positions represent historically under-represented groups.¹
- ❖ “Wells Fargo’s policy on diverse hiring came under fire last month, when about a dozen current and former employees of the bank told The New York Times that Wells held phony job interviews for nonwhite and female job-seekers for positions that had already been offered to other candidates.”²

¹ Wells Fargo, [2022 Diversity, Equity, and Inclusion Report](#) (May 2022).

² Dan Ennis, [Wells Fargo pauses policy mandating diverse interviews](https://www.bankingdive.com/news/wells-fargo-pauses-policy-mandating-diverse-interviews/624946/), BankingDive (June 7, 2022), <https://www.bankingdive.com/news/wells-fargo-pauses-policy-mandating-diverse-interviews/624946/>.

EPLI Checklist

- ▼ Is it EPLI?
 - ❖ D&O and GL policies likely exclude employment actions.
- ▼ Consider “Insured.” Include organization and decision-makers.
 - ❖ Missouri Public Entity Risk Management Fund v. Investors Ins. Co., 451 F.3d 925 (8th Cir. 2006).
- ▼ Consider “Claim” and employment action.
 - ❖ Look for coverage of statutory and tort claims, Title VII, ADA, ADEA, Section 1981, GINA, etc.
 - ❖ Some policies have separate whistleblower or retaliation provisions.

EPLI Checklist

- ▼ Consider “Loss.”
 - ❖ Damages, attorney fees, court costs, punitive damages, defense costs?
- ▼ Check the “Exclusions.”
 - ❖ Does it exclude intentional acts or punitive damages?
- ▼ Wages.
 - ❖ EPLI policies often exclude claims for wages. Look for inclusion of future wages or compelled choice of reinstatement.

EPLI Checklist

- ▼ Claims Made vs. Occurrence Basis.
 - ❖ Don't leave gaps.
- ▼ Jurisdiction.
 - ❖ Some insurance policies adopt the public policy of the most favorable state connected to the insurance policy.
- ▼ Limits.
 - ❖ An issue with your DE&I could turn into a class action. Is a class action one claim or multiple claims? What limit on loss applies?

EPLI Checklist - Final Words

- ▼ Shop around.
 - ❖ If the DE&I plan you want doesn't work with your current EPLI provider, put the EPLI out to bid.
 - ❖ A continuing business relationship with you will have value to the insurer. Negotiate for what you want.
 - ❖ Consider negotiating for choice of counsel.
- ▼ Pay attention to choice of counsel and the power to settle claims.
- ▼ File claims early.

EPLI Checklist - Final Words

▼ Remember:

- ❖ Your EPLI policy is a contract and is subject to legal argument. If you don't like the insurer's retention of rights letter, consult your own coverage counsel.

Advantages to Aligning DE&I with EPLI

- ▼ Continuous coverage is prudent.
 - ❖ A poorly executed DE&I plan might create multiple legal claims—all at one time or sequentially.
- ▼ Insurance providers are repeat players in the legal market.
 - ❖ The insurer's panel counsel will be cheaper per hour than any other equally qualified counsel. (You may negotiate to keep your regular employment litigation counsel.)
- ▼ Insurance adjusters are experienced litigation managers.
 - ❖ (You may also want your own counsel to oversee litigation.)

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Questions?

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