



Alerts

Early COVID-19 Liability Suits Raise Employment Practices Liability Insurance Issues

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Insights for Insurers

The COVID-19 pandemic has forced employers across the country to rapidly make numerous and significant decisions about how to manage their business in this unprecedented time. Employers have had to quickly develop and implement policies and procedures addressing remote work, layoffs, furloughs, pay cuts, workplace conditions, and a host of other issues. Not surprisingly, we're already starting to see COVID-19-related lawsuits being filed against employers.

The first suit was [filed against Walmart](#) by the estate of an employee who passed away due to complications of COVID-19 on March 25, 2020. The complaint alleged that store management knew that several employees and individuals at the store were exhibiting symptoms of COVID-19. Nevertheless, the estate alleged, Walmart was negligent in the following respects:

- Failing to cleanse and sterilize the store in order to prevent infection of COVID-19;
- Failing to implement, promote, and enforce federal and state social distancing guidelines;
- Failing to provide the decedent and other employees with personal protective equipment such as masks, latex gloves, and other protective devices;
- Failing to warn the decedent and other employees that various individuals were experiencing symptoms at the store and may have been infected by COVID-19, which was present and active within the store;
- Failing to adequately address or otherwise ignoring other employees who had communicated that they were experiencing signs and symptoms of COVID-19;
- Failing to follow Department of Labor and Occupational Safety and Health Act (OSHA) recommendations;
- Failing to follow CDC guidelines to keep the workplace in a safe and healthy condition and to prevent employees and others within the store from contracting COVID-19;
- Failing to develop an Infectious Disease Preparedness and Response Plan as recommended by the CDC;
- Failing to prepare or implement basic infection prevention measures as recommended by the CDC;

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- Failing to conduct periodic inspections of the condition and cleanliness of the store as recommended by the CDC;
- Failing to provide employees with antibacterial soaps, antibacterial wipes, and other cleaning agents as recommended by the CDC;
- Failing to develop policies and procedures for prompt identification and isolation of sick people as recommended by the CDC;
- Failing to develop, implement, and communicate to its employees about workplace flexibilities and protections as recommended by the CDC;
- Failing to implement engineering controls designed to prevent COVID-19 infection including, such as installing high-efficiency air filters, increasing ventilation rates in the work environment, and installing physical barriers such as clear plastic sneeze guards, as recommended by the CDC;
- Failing to cease operations of the store and to otherwise close the store when it knew, or should have known, that various employees and others present at the store were experiencing symptoms of COVID-19;
- Failing to properly train personnel to implement and follow procedures designed to minimize the risk of contracting COVID-19;
- Failing to periodically interview and/or evaluate employees for signs and symptoms of COVID-19;
- Failing to prohibit employees who were exhibiting signs and symptoms of COVID-19 from working at the store or otherwise entering the premises; and,
- Hiring employees via telephone and other remote means in an expedited process without personally interviewing or evaluating whether prospective employees had been exhibiting signs and symptoms of the COVID-19 prior to the commencement of their employment.

A second wrongful death lawsuit was [filed in Texas state court](#) against a meat packing company following the death of a forklift driver at the defendant's plant. Plaintiffs alleged that the decedent was told he would be laid off if he didn't report to work—despite exhibiting symptoms of COVID-19—and that the defendant "refused to take the pandemic seriously, and kept its functions as normal, taking no precautions and implementing no protocols for the safety of its workers." The plaintiffs further alleged that, "[a]round April 8, 2020 it had become very clear that people in the factory were sick, and that Covid-19 was among them – factory owners and managers played the fiddle. [The decedent] contracted the disease at work, was forced to separate from his partner and children, in order to protect them, and then – became part of the statistic of over 60,000 people who have died in the USA since the pandemic took hold." The plaintiffs asserted claims for negligence and wrongful death asserting the defendant failed to:

- Supervise the environment, placing protocols, providing and requiring masks, gloves, and enforcing six feet social distancing as per CDC and local orders;
- Provide safety tools and equipment that is the basis of this lawsuit;
- Ensure company premises were maintained in a way to prevent illness and injuries to its employees;
- Supervise the employee's activities as per CDC and Dallas County protocols;
- Warn employees as to the hazards of their employment post COVID-19 pandemic;
- Install, adopt, or employ adequate safety measures to prevent COVID-19 incidents.

Undoubtedly, these lawsuits are just the tip of the iceberg. See, e.g., ["2 Utah County businesses told staff to ignore COVID-19 guidelines, resulting in 68 positive cases,"](#) *Daily Herald*, May 5, 2020 and ["A Detroit Nurse Was Fired After Speaking Out About Her Hospital's Handling Of The Coronavirus Outbreak. Now She's Fighting Back,"](#) *Buzzfeed News*, April 21, 2020. As more organizations attempt to reopen in the absence of a coronavirus vaccine, we will likely see a substantial wave of employment-related COVID-19 lawsuits, leading to claims under Employment Practices Liability Insurance (EPLI) policies.

We consider some of the likely EPLI coverage issues below.



COVID-19 EPLI Coverage Issues

We note at the outset that there is no standard EPLI policy, and coverage terms, conditions, and exclusions vary considerably. Accordingly, review of the precise language of the particular policy will be required. When considering COVID-19 EPLI claims, insurers should pay special attention to the following issues:

Notice

Although timely notice of a claim is a critical threshold issue under virtually every insurance policy, it can be particularly challenging in the EPLI context where verbal communications with employees could constitute notice under certain policy forms. Policy requirements for notice of claim and notice of circumstances, if applicable, should be closely considered in the context of the information provided by the insured. Since EPLI policies are typically written on a claims-made basis, it's important to make sure the claim was reported within the timeframe specified in the policy. Prior notice issues also should be considered. Decisions concerning the disposition of notifications under EPLI policies should be consistently made, timely, and well documented.

Employment Wrongful Act

Another threshold issue to be examined is whether the claim falls within the policy's definition of an "employment wrongful act." Keep in mind that many EPLI policies contain manuscripted provisions, so it will be important to carefully review the entire policy and endorsements. The impact of COVID-19-related governmental orders may also need to be evaluated in connection with any claim. When considering claims brought against the insured by non-employees—such as customers, clients, and vendors—it will be important to ascertain whether the policy extends coverage to third-party employment practices.

Bodily Injury Exclusion

Bodily injury claims are typically excluded under EPLI policies, although such exclusions often contain an exception for emotional distress or mental anguish claims. Distinctions between exclusions for claims "for bodily injury" versus claims "arising out of bodily injury" could be important in some instances.

OSHA and FMLA Violations

COVID-19 claims for actual or alleged OSHA and Family and Medical Leave Act (FMLA) violations may be subject to OSHA and FMLA exclusions. Those exclusions typically will have a carve-out for related retaliation claims, such as an allegation that an employee was impermissibly laid off after exercising OSHA or FMLA rights, so careful review of the claim is imperative.

Wage and Hour and FLSA Claims

Most employers have instituted new work routines for their employees as result of COVID-19 and related government orders, including work from home, self-quarantine requests, procedures concerning time capture, and new work schedules. This could lead to compensation disputes giving rise to Wage and Hour and Fair Labor Standard Act (FLSA) claims. Depending on the terms of the policy, such claims may be excluded entirely, covered only for defense costs, or fully covered.

WARN Act Exclusion

In light of widespread COVID-19 layoffs and furloughs, employers are likely to face wrongful termination lawsuits. While EPLI policies generally cover claims for wrongful termination, retaliation, and discrimination, claims for Worker Adjustment and Retraining Notification (WARN) Act violations typically are excluded. The policy, however, may contain "employment events" coverage, which is triggered by terminations affecting a specified percentage of the workforce, *i.e.* 10-15% of employees.

Criminal and Fraudulent Acts Exclusion



Depending on the particular facts giving rise to a claim, a policy exclusion for malicious, fraudulent, and criminal acts or omissions may apply. The exclusion should be carefully reviewed with regard to the timing of its application; many exclusions are not triggered until there is an adjudication of the deliberate act or omission. The exclusion may also have a carve-out for defense costs. An insurer's reservation of rights concerning these issues should be carefully considered in light of the allegations at issue, the precise policy language, and the applicable law. Insurers should also check for potentially relevant exclusions for punitive and exemplary damages.

Issues Arising from PEOs

A growing number of today's companies utilize the services of professional employer organizations (PEOs) to manage certain human resources functions and related administrative functions. Depending on the services provided by the PEO (for example, whether the PEO is the employer of record or a co-employer) and the legal relationship between the insured company and the PEO, a variety of issues impacting coverage under an EPLI policy may arise. Coverage for any given claim may also implicate the PEO's EPLI policy, so insurers should review their policy's "other insurance" provision, which may need to be addressed when considering its defense obligation and reserving rights.

Injunctive and Equitable Relief

Employers should anticipate lawsuits demanding they implement certain actions and/or make accommodations to remedy alleged unsafe employment practices and workplace conditions, including for employees who are members of a protected status. Typically, EPLI policies do not cover costs to comply with injunctive relief, costs of accommodations associated with disabilities, or other protected status, benefits due, or salary obligations. Front pay and back pay, however, are often covered in the policy's definition of "loss." These issues should be kept in mind when evaluating coverage and reserving rights.

Final Thoughts

EPL insurers should anticipate an increasing number of COVID-19-related claims, particularly as many companies are taking steps to reopen their businesses. In this regard, it's worth noting that as an added benefit to policyholders, some EPLI policies provide access to pre-claim legal advice services from qualified employment counsel. Given the wide range and high stakes of COVID-19 risks confronting employers, some insurers have reminded their policyholders about taking advantage of this service.