

THE EVOLUTION OF EPL

Why Every Employer Needs It



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1992 AND ANITA HILL

According to Jury Verdict Research, 734,563 employees charged their employers with harassment suits between 1992-2000. Why was 1992 significant? In 1992 the Anita Hill and Clarence Thomas hearings were held in Washington D.C. The actions that led to this event were plastered across the front pages of most newspapers; daily updates were given on the 6 o'clock news. The live stream on CNN made a spectacle of the facts of this case in every home and workplace, providing food for thought to the masses. After seeing this played out, many Americans saw similarities in the abuse experienced by Anita Hill and events to which they themselves had been subjected. As a consequence of these hearings, many women filed claims against their employers.

WGA is a leading provider of insurance brokerage, risk management and employee benefits services to firms with complex risks, within industries that include high technology, life sciences, financial risks, healthcare, energy, and environmental services. WGA has offices in Boston, MA; Princeton, NJ; Columbia, MD; Atlanta, GA; and Paris, France.

In the years since 2000, the instances of claims for harassment have continued to rise. In 65% of these cases, plaintiffs win either by settlement or final adjudication. While the plaintiffs may not win the other 35% of cases, employers must still pay to defend themselves, and the cost to do so can be significant.

With your indulgence, we will explain why and when you as an employer are liable for employment related matters. We will bring to light the legal basis for the current code of employment conduct and how its evolution has impacted the employer/employee relationship. We will also provide some suggestions to help you mitigate your exposure. Finally, we will offer some insurance based solutions that will be there to assist you in the event that you do find yourself in litigation, and also include loss control and risk avoidance measures.

THE LEGISLATION BEHIND THE LITIGATION

Employment Practices related lawsuits are a relatively new phenomenon. In 1900, the U.S. was in the middle of an Industrial Revolution. The employers held all of the cards as there were fewer jobs. If an employee fell ill and missed a day's work she/he could, and would, be replaced. She/he was an "at-will" employee. "Employment at Will" means that the employer and/or employee could terminate their relationship for whatever reason, whenever they wished.

Beginning in 1964, there was significant legislative reform that has substantially shifted the dynamics of the employer/employee relationship, by granting employees more rights. These reforms include the legislative items found at the top of page two.

- Title VII of 1964 Civil Rights Act
- Age Discrimination in Employment Act of 1967
- Americans with Disabilities Act of 1990
- Family and Medical Leave Act of 1993

In 1964, the government passed one of the widest ranging federal statutes ever: the Civil Rights Act of 1964. Title VII of this law applies to employers in any industry “affecting commerce” provided that they have 15 or more employees who worked 20+ weeks in the preceding calendar year. This law prohibits discrimination of certain protected classes based on their race, color, sex, national origin and religion. Title VII is enforced by the EEOC (Equal Employment Opportunity Commission). In order to file a claim, the injured party must report the allegation to the EEOC within 180 days of the last alleged wrongful act. Based on the merits of the allegation, the EEOC will determine if the case has merit. If so, the EEOC will bring a suit against the employer on behalf of the employee.

In 1967, Congress passed the Age Discrimination in Employment Act (ADEA), prohibiting discrimination against individuals 40 years of age and older. This law applies to all employers in industries “affecting commerce” with at least 20 employees working 20+ weeks in a calendar year.

In 1990, the passage of the Americans with Disabilities Act (ADA) came, prohibiting discrimination against Americans with disabilities. This law applies to any employer in an industry “affecting commerce” with 15 or more employees working 20+ weeks in a calendar year. The law states that an employer must make whatever “reasonable accommodations” necessary for the employee or applicant to be able to do the “essential functions” of the job. The key to note here is that “reasonable accommodations” is not defined, and the employee with the “reasonable accommodations” is only expected to perform “essential functions” of the job, not “ALL” functions. An employer’s failure to make “reasonable accommodations” can result in an action brought under ADA. ADA is enforced by the EEOC and complaints must be made within 180 days of the last alleged wrongful act.

Finally in 1993, the Family and Medical Leave Act (FMLA) came onto the scene. This law provides for up to 12 weeks of unpaid absence from work for employees needing to tend to their own serious medical needs, as well as those of a parent, child, sibling or spouse. In addition, this law applies to leave for the birth or adoption of a child. This law provides the employee with the assurance that, legally, the employer must allow them to return to work in a “similar” capacity. This law applies to all employers involved in an industry that “affects commerce” with 50 or more employees working 20+ weeks in a calendar year. The government, realizing that such strict guidelines would cripple small businesses, made an upward adjustment from 20 to 50 for the qualifying employee count. FMLA also stipulates that an employee must have been an employee for at least 1 year working 1250 hours in order to qualify. This law is enforced not by the EEOC, but by the Department of Labor (DOL). Employees may bring suit against their employer directly or with the assistance of the DOL for violations of their rights pursuant to FMLA.

In addition to these federal statutes, most states have additional laws on their books that, at a minimum, meet the standard of the federal laws; and, in many instances, exceed the federal standards.

THE EVOLUTION OF “EMPLOYMENT AT WILL”

Why go through this litany of rules and regulations? It is because of these changes in how an employer is allowed to conduct its business that Employment Practices have evolved. Remember, in 1900 the employers held all the cards. “Employment at Will” was just that; employees were employed at the will of employers. Today, while “Employment at Will” is still the standard, employers are subject to many more regulations as to how to conduct their employment practices. Failure to comply with these regulations can readily lead to employment related litigation against employers. Prior to the advent of Employment Practices Liability insurance, claims stemming from employers failing to comply with these laws would typically be submitted to the General Liability and Directors’ & Officers’ Liability insurers. Since it was never the intent of the underwriters of these two coverages to be providing insurance for these types of claims, Employment Practices Liability insurance was born. Insurers put exclusions on their GL and D&O policies, and although this “new” coverage existed, companies were slow to purchase EPL as stand alone coverage. Now, however, EPL has become a staple of most companies’ insurance portfolios.

MITIGATING YOUR EXPOSURE AS AN EMPLOYER

Employers today should use several risk management approaches to mitigating their exposures to EPL litigation. First, and foremost, is prevention and training. Employers should know the laws that have been mentioned here and how they apply to their business. Second, employers affected by these laws should seek to transfer risk by any available means, including insurance.

Sexual Harassment Claims have their legal basis in Title VII; sex, as defined by this law, is a protected class under this statute. There are two types of sexual harassment claims: 1. Quid Pro Quo – where an employer offers advancement, opportunity or continued employment, in exchange for sexual favors; and 2. Hostile Environment – when management is made aware of an employee in an “uncomfortable” situation, and does nothing to resolve the issue. Failure to “fix” the problem once management becomes aware of it can, and does, lead to litigation against the employer.

Managing the EPL exposure is crucial in the prevention of suits. Employers subject to regulations need to take the utmost care to develop strong loss prevention procedures. Any person involved in the interviewing process should be schooled in the Do’s and Don’t of interviews. In no way should potential employees be questioned about anything that might fall within a protected class. In the event an applicant is not hired, he/she can sue the employer, should he/she believe the basis for which employment was denied violated his/her rights under Title VII. References and background checks, employment applications, drug/alcohol testing and offer letters are all to be used as loss prevention measures when dealing with potential employees.

Once the employees are on board, employers can, and should, continue with loss prevention measures. Sexual harassment training, diversity management and employee handbooks outlining the employers policies and procedures, as relates to their employment practices, are some of the continued loss prevention measures to be taken. Even employers who do everything “right” are still exposed to liability and should consider their ability to transfer risk to an insurer.

THE ROLE OF INSURANCE

The basic premise of EPL insurance is to provide coverage for the unintended consequences of intentional acts. No one expects to get sued when they either fire someone or choose not to hire someone. In fact, you can hire or fire anyone you wish as long as you do it legitimately.

Most insuring clauses read that the Insurer will pay, on behalf of the Insured, loss for which the Insured becomes legally obligated to pay on account of a claim first made against the Insured for a Wrongful Employment Practice. What does it mean and what constitutes a Wrongful Employment Practice? Typically: Discrimination, Sexual Harassment, Wrongful Harassment occurring in the course of, and arising out of, an employee’s employment or an applicant’s application for employment. In addition to those situations noted above, the following acts are also insurable: breach of oral, implied or written employment agreement; negligent or wrongful evaluation; wrongful discipline; wrongful deprivation of career opportunity; wrongful denial of training; wrongful deprivation of seniority; wrongful failure to grant tenure; wrongful failure to employ or promote; employment related Invasion of Privacy; employment related misrepresentation; employment related defamation and employment related infliction of emotional distress.

One of the most valuable services provided by experienced Employment Practices Liability insurers is preemptive loss control. By working in partnership with an experienced EPL insurer to implement an integrated and flexible Loss Prevention Program, an employer can ward off many potentially devastating lawsuits. There are a variety of risk management tools available in the marketplace today:

- Newsletters
- Desk Reference Guides/CD Roms
- Toll-Free Hotlines
- Internet Reference Sites
- Audits
- Web-based Applications

The best programs provide information to assist you in reducing exposures, and when an EPL claim does arise, they should provide a sound defense to reduce the severity of any resulting financial loss.

To learn more about how to address your exposure to EPL related claims and the coverages that can be afforded to you, please contact your WGA Account Executive at 617.261.6700.



