

# Best Practices for Preventing Employment Related Claims



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# Employment Practices Liability Insurance

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## What is it?

- Employment practices liability (EPL) insurance is a policy used to cover your risks due to some of the most common employment-related lawsuits

## What does it cover?

- Wrongful Termination
- Failure to Hire
- Discrimination
- Sexual Harassment
- Retaliation



# Employment Related Claims by Numbers

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- In the past **20** years –
  - Employee lawsuits have risen about **400%**
  - Wrongful termination suits have risen about **260%**
- Almost **75%** of litigation against corporations include employment disputes
- Approximately **41.5%** of employee lawsuits are against private employers with less than **100** employees
- **7 out of 10** businesses don't carry EPLI
- **\$10,000-\$15,000** is the average court costs and legal fees when case is dismissed
- **\$10,000-\$50,000** is the average court costs and legal fees when settled out of court
- **\$150,000-\$200,000** is the average court costs and legal fees when case goes to trial
- **\$217,000** is the average jury award if a case goes to trial and the employer loses
- **18-24** months is the average duration of time to reach a resolution for a claim

# How to Prevent Claims

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- Evaluate your hiring process
- Evaluate your employment practices
  - Prevent harassment and discrimination
- Evaluate your termination process



# EEOC Charge Statistics

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	FY 2014	FY 2015	FY 2016
Total Charges	88,778	89,385	91,503
Race	31,073 (35%)	32,309 (34.7%)	32,309 (35.3%)
Sex	26,027 (29.3%)	26,396 (29.5%)	26,934 (29.4%)
National Origin	9,579 (10.8%)	9,438 (10.6%)	9,840 (10.8%)
Religion	3,549 (4%)	3,502 (3.9%)	3,825 (4.2%)
Retaliation (all statutes)	37,955 (42.8%)	39,757 (44.5%)	42,018 (45.9%)
Age	20,588 (23.2%)	20,144 (22.5%)	20,857 (22.8%)
Disability	25,369 (28.6%)	26,968 (30.2%)	28,073 (30.7%)
Equal Pay Act	938 (1.1%)	973 (1.1%)	1,075 (1.2%)
GINA	333 (0.4%)	257 (0.3%)	238 (0.3%)

# Preventing Claims through Proper Hiring Practices

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- Internal Posting policy
- Employment Application
  - Ban the box laws
- Background and/or credit checks
- Interview and Selection Process
  - Interviewer training
- New Hire Paperwork
  - I-9 Form

COMPANY OR EMPLOYER NAME: \_\_\_\_\_

**Employment Application**

YOUR NAME: \_\_\_\_\_ Last

ADDRESS: \_\_\_\_\_

POSITION APPLIED FOR: \_\_\_\_\_

APPLICANT TELEPHONE: \_\_\_\_\_

SOCIAL SECURITY NUMBER: \_\_\_\_\_

ARE YOU LEGALLY ELIGIBLE FOR THE JOB? (if yes)

Yes  No

I AM SEEKING A PERMANENT POSITION

IF NECESSARY FOR THE JOB, ARE YOU OVER (Please mark one) DAYS AFTER BEING NOTIFIED THAT YOU WILL BE ABLE TO REPORT TO WORK \_\_\_\_\_

Are you able to perform the essential functions of the position with or without accommodations?

Yes  No

Work overtime? Provide a valid reason: \_\_\_\_\_

# Preventing Claims During Employment

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- New Hire Orientation
- Handbook Policies
  - Leave Policies (e.g., FMLA, ADA)
  - Harassment/Discrimination Policies\*
  - Discipline Process
  - At-will employment policy
  - EEO Policy
  - Open Door/Grievance Policy
  - Internet Usage
  - Handbook Acknowledgement Page
- Employee Training
- Performance Reviews
- Job Descriptions
- Maintain Accurate Employee Files





# Preventing Harassment and Discrimination

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- Who is protected?
  - Civil Rights Act of 1964
    - Race, color, religion, national origin, and sex
  - Equal Pay Act of 1963
  - Age Discrimination in Employment Act of 1967
    - 40+
  - Immigration Reform and Control Act 1986, 1990, 1996
    - National origin and citizenship
  - Americans with Disabilities Act of 1990
  - Pregnancy Discrimination
  - Genetic Information Nondiscrimination Act
  - *Be on lookout for laws protecting gender identity and transgender rights*



# Preventing Harassment and Discrimination

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- About 70% of women and 20% of men have experienced sexual harassment
- About 15,000 sexual harassment cases are filed each year
- Charges of sexual harassment cost U.S. companies almost \$40 million each year
- Complaints filed by men have more than tripled in recent years



Telephone poll conducted by Louis Harris and Associates on 782 workers.

# Preventing Harassment and Discrimination

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- Gender discrimination is becoming a very prevalent topic
- Sex – a status assigned at birth- male/female
- Sexual orientation – refers to their sexual preference (homosexual, heterosexual, bisexual, etc.)
- Gender identity – the sex a person identifies with
- Gender expression – the characteristics an individual expresses (hair, nails, etc.)
- Transgender – refers to people whose gender identity and/or gender expression differs from the sex assigned to them at birth
- Gender transition – the process of shifting to live as the gender one identifies with
  - May or may not involve medical procedures
- *When in doubt, discuss with HR, broker, and/or legal counsel!*



# Preventing Harassment and Discrimination

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- Train employees and supervisors about the different types of harassment and discrimination
  - Protected classes of individuals
  - Quid Pro Quo
  - Hostile Work Environment
- Impact vs. Intent
  - The impact of the behavior – whether it was intended or not is what determines harassment
- Take all complaints of harassment and discrimination seriously; investigate all complaints
  - As confidentially as possible but don't promise confidentiality
- Don't delay communication with HR!
  - Vicarious liability
- Always follow up
  - Communicate results of investigation
  - Discipline as needed
  - Monitor
- Avoid retaliation; communicate organization's stance on retaliation and treat as seriously as any other complaint

# Preventing Claims During Termination

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- Institute an approval system; one person cannot solely decide to terminate an employee
- Train supervisors/managers on handling the conversation
- Have a witness in place (e.g., Manager and HR)
- Gather copies of documentation, including information about COBRA, outplacement services, and severance packages, for the employee (if applicable)
- Give a clear and consistent explanation as to why you are terminating the employee.
- Avoid talking too much during the meeting or making promises you can't deliver on, such as helping the employee look for another job.
- **Treat the employee with dignity and respect during the entire process.**
- Allow the employee to vent if he or she gets angry, but refrain from arguing about the decision.
- **Don't belittle the employee or discuss details of termination to other staff members after he or she leaves.**



# Responding to EPLI Claims

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- Lean on an Employment Attorney
  - Establish relationship now
- Notify Your Carrier/Broker
  - Work with broker to choose your EPL panel attorney
  - Promptly Respond to EEOC Charge with as much detail as possible



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