

Audio Conference Course Material

Should You Carry Employment Lawsuit Insurance? Separating EPLI Fact from Fiction

Course: YH6291



Tuesday August 1, 2006
11:00 a.m. – 12:30 p.m. Eastern
10:00 a.m. – 11:30 a.m. Central
9:00 a.m. – 10:30 a.m. Mountain
8:00 a.m. – 9:30 a.m. Pacific

Presented by:

Raymond Mak & Michael Kalish

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This audio conference does **NOT** offer Continuing Legal Education (CLE) credit for attorney participation, or CPA credit for accounting professionals.



This program has been approved for 1.5 credit hours toward PHR and SPHR re-certification through the Human Resource Certification Institute (HRCI). For more information about certification or re-certification, please visit the HRCI homepage at www.hrqi.org.

Potential Insurance Coverage for Employment-Related Claims:

EPSTEIN BECKER & GREEN P.C.

- Comprehensive General Liability (CGL)
- Workers' Compensation
- Directors & Officers (D&O)
- Home Owners
- Employment Practices Liability Insurance (EPLI)



EPLI Policies:

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- Covered Claims Not Limited to Lawsuits
- Demand For Money Damages
- Charges Before EEOC or State Agency
- Covers Not Only Discrimination Claims Based Upon Federal Law, But Also State and Local Laws



Almost All EPLI Policies Now Also Provide Coverage For:

EPSTEIN BECKER & GREEN P.C.

- Workplace Torts – e.g., Invasion of Privacy, Employment-related Defamation & Misrepresentation, Negligent Hiring, Supervision & Retention
- Retaliation – Even if The Underlying Claim is not Covered

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“Better” EPLI Policies Will Also:

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- Cover: Third Party Claims
Punitive Damages
Workplace Harassment
(not just sexual harassment)
- Include: Definition of “Wrongful Termination”:
 - Constructive discharge
 - Wrongful discipline
 - Negligent evaluation
 - Wrongful demotion
- Provide: Full Prior Acts Coverage
- Restrict: Duty to Report Claims to Certain Individuals
Definition of Claim to Written Demand, Action or Suit

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“Claims-Made” Requirement:

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- Is a limitation
- Claims Made and Reported Requirement
- Importance of definition of Claim
- When must claim be reported to Insurer

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Common Exclusions in EPLI Policies:

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- Wage/Hour & Overtime Claims - FLSA or Similar State & Local Laws
- Relating to Collective Bargaining Agreements, Union Activities & NLRB matters
- WARN
- OSHA
- ERISA
- RICO
- COBRA
- Unemployment Claims
- Workers' Compensation Claims
 - But Claims of Retaliation Against Exercise of Rights Pursuant to Such Laws Are Covered

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Other Exclusions From Coverage:

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- Deliberate Dishonesty
- Malicious or Fraudulent Act or Omission



“Loss” Exclusions:

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- Injunctive or Declaratory Relief
- Job Reinstatement or Other Equitable Remedy
- Fines, penalties, multiple damage awards
- Costs of ADA accommodations
- Workplace remedies (e.g., harassment training)



Who Selects Defense Counsel?

EPSTEIN BECKER & GREEN P.C.

Four (4) Possible Scenarios:

1. Duty To Defend - Defense Counsel Selected From Approved Panel List
2. Duty to Defend - But Insured Negotiated Right to Select Defense Counsel
3. Duty to Defend - But Insured has Right to Select Defense Counsel Due to Coverage Issues
4. "Indemnification" or "Pay on Behalf of" Basis – Insured Has Right to Select Defense Counsel

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Selection of Defense Counsel:

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- Ideal is Discuss & Agree at Time of Underwriting
- Difficulties When Insured Has Say in Selection
- Insurers Usually Prevail in Choice, Unless Have Independent Counsel Considerations

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Ethics & Conflicts Issues:

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- Who is the Client?
- “Tripartite” Relationship
- Independent Counsel

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Policy Purchase Considerations:

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- Deductible
- Co-insurance
- Limit of Liability
- Additional/Special Coverages
 - What do you realistically need?

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Underwriting Considerations:

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- Size of Company
- Number of Employees
- Demographics
- Employment Policies and Procedures
- Claims Experience
 - Frequency
 - Severity

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Must Negotiate/Agree Upfront:

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- Litigation Philosophy
 - General Strategies
 - Settlement
 - “Hammer” clause?
- Identification of Defense Counsel
- Defense Counsel Rates & Disbursements
- Litigation Management Guideline Provisions

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Attorney Raymond T. Mak is a member of Epstein Becker's labor and employment practice in its New York office and is responsible for managing the firm's EPLI business. In a fairly unique arrangement, he manages the law firm's relationships with a large number of insurance companies that offer EPLI. He also has been in charge of the employment litigation unit in a major corporation and has served as head of an EPLI claims department for a major insurance company, so he's dealt with the issues from several different perspectives and knows EPLI inside-out. He has been a featured writer and speaker on the subject.



Attorney Michael A. Kalish is also a member of Epstein Becker's labor and employment practice group in New York. He counsels public and private sector employers in a variety of matters, including compliance with federal and state labor and employment laws, and litigates discrimination, sexual harassment, noncompetition, employee benefits, and wrongful termination cases. He is the editor of New York Employment Law Letter, in which he covers EPLI issues extensively. He speaks frequently at conferences and before business groups on current employment topics and is a member of the adjunct faculty of the Cornell University School of Industrial and Labor Relations, where he teaches courses in its Human Resources and the Law Program.

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Audio Seminar Evaluation

Please mark only one for each question.

Should You Carry Employment Lawsuit Insurance? Separating EPLI Fact from Fiction

Seminar Date: Aug. 1, 2006

Event ID: YH6291

Scale Definition:	P – Poor	F – Fair	G – Good	VG – Very Good	E - Excellent
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- | | P | F | G | VG | E |
|--|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| 1. Overall rating of program..... | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
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Presenter: Overall Effectiveness

- | | | | | | |
|---------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| 5. Raymond Mak..... | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Michael Kalish | | | | | |

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6. How many people listened at your site?
- 1
 2
 3
 4
 5
 6-10
 11-15
 16-20
 21+
7. Would you participate in another virtual seminar?..... Yes No

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Name of participant (optional): _____

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