



A Primer On Employment Practices Liability Insurance

Most dentists understand the need for professional liability insurance, but those who employ staff may neglect to purchase employment practices liability insurance (EPLI). Failing to obtain this coverage can cause the dentist—and the dental practice—significant harm in the case of a legal claim. Employment-related claims can be time consuming, hard to resolve, and expensive to defend. According to a 2017 report from Hiscox, the average claim took 318 days to resolve, and the average cost for cases that resulted in a defense and settlement payment was \$160,000.

This article presents an overview of what dentists need to know about EPLI, including what it is and what it covers. Dentists also can take steps to reduce the risk of situations that prompt the need for them to turn to their EPLI policies.

EPLI basics

According to a Society for Human Resource Management article by Tobenkin, EPLI protects a business against claims related to the employer-employee relationship from the job application process through to termination. EPLI claims are not uncommon; in fiscal year 2019 the US Equal Employment Opportunity Commission (EEOC) received 72,675 charges of workplace discrimination.

Lawsuits are often based on a plaintiff experiencing some form of economic injury related to employment. These claims can be made by current employees, former employees, and job applicants. Examples of claims include retaliation, sexual harassment, discrimination, wrongful termination, breach of employment contract, negligent evaluation, failure to employ or promote, wrongful discipline, deprivation of career opportunity, wrongful infliction of emotional distress, and mismanagement of employee benefits plan. These types of claims can be categorized as discrimination (violation of a state or federal discrimination law), wrongful termination (for example, firing the employee unlawfully by breaching an employment contract or in retaliation for filing a discrimination complaint), and workplace torts (for example, wrongful discipline, invasion of privacy). In fiscal year 2019, the most common types of EEOC claims filed were retaliation (53% of all charges filed) and disability (33%), race (33%), sex (32%), and age (21%) discrimination.

Coverage

Media coverage of claims related to issues such as sexual harassment has spurred an increase in the number of businesses purchasing EPLI insurance. EPLI policies typically cover the business's costs of defending a lawsuit in court (whether the lawsuit is successful or not) as well as judgments and settlements.

Some policies state the insurer has a "duty to defend," which means they are obligated to defend against lawsuits related to claims stated in the policy. This also means that the insurer has the right to choose the attorney that represents the business in the matter. If no duty to defend exists, the business can choose their own attorney, although some insurers require the choice be made from a list of approved attorneys. Many EPLI policies also include a "consent-to-settle" clause, referring to the fact that the insurer cannot settle the claim without the business owner's consent.

Dentists may want to consider policies that provide protection against claims made by non-employees, for example, a patient who claims sexual harassment by a dental provider.

EPLI policies usually do not cover wage and hour claims (for example, not paying for time spent donning and doffing personal protective equipment), punitive damages, criminal acts, contractual liability, breach of contract, property damage, or violation of various local, state, or federal laws (for example, the Worker Adjustment and Retraining Notification Act, COBRA, the National Labor Relations Act, the Occupational Safety and Health Act, and the Americans with Disabilities Act).

An EPLI policy, which is renewed annually, is usually written on a claims-made policy form, which means the policy covers claims that occur *and are reported* while the policy is in force. Once the policy expires, coverage expires.

Some companies provide EPLI as part of a general business owner's policy, while others offer it as a separate policy (see *Types of insurance*). The cost depends on several factors, including the number of employees, the size of the business, the amount of coverage desired, and whether the business has been sued in the past for its employment practices.

Dentists should review EPLI policies closely. One area to check is the list of covered acts; this list should include the main ones listed earlier in this article. It is best to compare options from different companies before making a decision. The dentist may want to seek input from a human resources expert and an attorney as well.

Prevention

Dentists should put policies in place to reduce the likelihood of a situation where the EPLI coverage needs to be enacted (see *Preventing employee lawsuits*). These policies should be structured to avoid the types of employment practices discrimination identified by the EEOC: age, disability, equal pay/compensation, genetic information, national origin, pregnancy, race/color, religion, retaliation, sex, and sexual harassment.

Policies should address the scope of the employer-employee relationship, beginning with the application process and ending with termination. The employee handbook is an essential tool for communicating policies to avoid misunderstandings that can lead to claims. Examples of policies to include are those related to performance review, probation, termination, and the process for filing complaints.

Accepting and responding to employee complaints is of key importance because failure to do so may lead to more serious charges by the employee. Complaints should be acknowledged promptly and addressed as quickly as possible. The dentist may need to speak with the employee and others involved in the situation before taking action. It is vital that the dentist remain objective throughout the process. Documentation of the complaint, investigation, and outcome should be thorough. In

many cases, the dentist can handle the complaint, but in more serious or complicated cases, a human resources professional should be consulted.

Employment-related laws change, and most dentists do not have the time or resources to continually monitor for changes. Therefore, consultation with a human resources professional is essential. It may be helpful to set regular meetings to review policies and discuss any changes that may be needed.

Optimal protection

Insurance can provide dentists with the protection they need against legal action. It is important that they ensure coverage is complete, including an ELPI policy, and to take actions designed to prevent claims that will require dentists to use that coverage.

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Dentist's Advantage

Types of insurance

Employment practices liability insurance is just one type of insurance a dental practice needs. Others include the following:

- **Cyber liability insurance:** Protects against claims relating to inadequately safeguarding sensitive private data, such as credit card information; often the breach occurs by a hacker.
- **General liability insurance:** Protects against financial loss as the result of bodily injury, property damage, medical expenses, libel, slander, defending lawsuits, and settlement bonds or judgments.
- **Professional liability insurance:** Protects against financial loss as a result of malpractice, errors, and negligence.
- **Business owner's policies:** Combine the typical coverage options into one bundle. This can save money; however, dentists should be clear about what is (and is not) included in the package.
- **Workers compensation insurance:** Pays the expenses of an employee's work-related illness or injury; most states require this coverage.

Dentists should collaborate with an insurance provider to assess risks and review coverage at least annually.

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Preventing employee lawsuits

Dentists should have employment practices liability insurance to protect themselves against employee lawsuits, but they also should take steps to prevent such lawsuits from being filed.

- Ensure the business's hiring and screening programs are structured to avoid discrimination. For example, do not ask for gender or race on a job application form.
- Write policies that can be clearly understood and are not filled with legal jargon. Before finalizing, it may be a good idea to have an employee review and provide feedback to ensure policies are clearly written.
- Make policies easily accessible to employees by including them in an employee handbook that can be easily accessed or downloaded as a PDF.
- Provide education for employees about policies and the need to follow laws and regulations related to issues such as discrimination. Training should occur during the employee onboarding process and on a regular basis thereafter. Document the trainings in the employee's file.
- Ensure employees know what steps they should take if they believe sexual harassment or discrimination has occurred. Be sure everyone in the practice understands that such actions are unacceptable.
- Put in place a policy for how to file a grievance and detail how grievances will be handled. Act promptly when complaints are received.
- Document issues objectively and completely.

RESOURCES

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Dental Expressions® – From the CNA Claim Files

Alleged Failure to Diagnose Infection During Dental Crown Therapy Results in Patient Injury

As explained in the previous issue of the [Risk Management Newsletter \(Volume 36 No. 2\)](#), infection may occur related to various dental and oral maxillofacial conditions. The risk of infection may increase for certain patients whose health status is compromised due to factors such as systemic conditions or medications that affect the immune system.

Infection also may be associated with dental procedures such as root canal therapy, implant placement and dental extractions. Although restorative dentists may decide to refer many or all such procedures, effective assessment and management of patient complaints is necessary in order to mitigate the risk of patient injury and prevent associated professional liability claims, as this crown and bridge case study illustrates.

CLAIM CASE STUDY

Practitioner:

General dentists

Claimant:

Male, aged 31 years; no current medications or medical conditions reported

Risk management topics:

treatment plan; patient communication and consent; dental emergency management; documentation

Facts:

The 31-year-old male patient sought care with the dentist for pain in his lower right quadrant. He had been experiencing discomfort off-and-on for several weeks and reported that his last dental visit was approximately 5 years prior for a cleaning and fillings.

Radiographs taken of the mandibular right quadrant revealed deep decay on the second premolar and second molar, with a large restoration on the first molar. Upon clinical examination, the dentist also discovered a fracture of the first molar restoration. After administering local anesthetic, the dentist removed decay and the faulty restoration. Temporary restorations were placed, and the patient was scheduled to return for further treatment in two days.

During his return visit, the patient reported only mild discomfort. As a result, the dentist proceeded to prepare the teeth for crowns and placed temporary restorations. When the patient returned approximately two weeks later, the gingival tissues were irritated and edematous. The dentist cemented three crowns, and the patient was released after being provided with home care instructions.

Within two days of the cementation visit, the patient noticed a return of pain in the lower right quadrant of his

oral cavity with a mild sore throat and neck stiffness. He took an over-the-counter pain medication but did not contact the dentist's office. Two days later, on a Saturday morning, the patient contacted the dentist's office, as his pain had increased. The office was closed, but the message provided the dentist's home phone number for dental emergencies. The patient called and spoke with the dentist's spouse (and office manager), who relayed the patient's complaints to the dentist. The dentist's spouse advised the patient that prescriptions for pain medication and an antibiotic were called into a local pharmacy and would be available for pick up within the next hour.

On Sunday, the patient called two more times and again spoke with the dentist's spouse. He was advised to continue taking the medications and to come to the dental office first thing on Monday morning for evaluation. The patient's spouse later called the dentist's home to explain that her husband's symptoms were not improving and that he had complained of difficulty swallowing. The dentist re-stated his recommendation, via his spouse/office manager, for evaluation on Monday morning.

The patient's condition worsened overnight. He was unable to sleep due to increased pain and discomfort. His neck stiffness and difficulty swallowing also increased and several hours before the dental office opened, the patient's spouse drove him to the local hospital emergency department (ED). After an assessment by the ED physician and a CT scan, the patient was transferred by ambulance to a regional medical center and admitted for care. He was discharged after a 2-week stay that included emergency airway management, IV antibiotic therapy and surgery to drain a retropharyngeal space infection.

Key Allegations:

inadequate assessment; inadequate informed consent; failure to diagnose; abandonment

Alleged Injury/Damages:

pain and suffering; severe emotional distress; physical trauma and scarring (tracheostomy, surgical drainage); past/future medical and dental expenses; loss of consortium

Analysis:

In the professional liability lawsuit filings, the plaintiff asserted that the dentist breached the standard of care in multiple areas, including:

- Inadequate examination and diagnosis, with poor quality/non-diagnostic radiographs.
- A lack of communication with the patient regarding the treatment plan and inadequate informed consent.

- Abandonment (failure to adequately investigate the patient's complaints; failure to speak with and/or examine the patient; failure to refer, leading to severe patient injury)

The claim investigation and expert review revealed multiple defense challenges:

- A documented treatment plan was completed. However, there was no record that the plan was discussed with, or approved by, the patient.
- A general treatment consent was signed. However, the patient denied that the dentist discussed the benefits, risks and treatment alternatives for the planned crown procedures. There was no documentation in the patient dental healthcare information record to support that a discussion occurred.
- Two radiographs taken at the initial visit were of poor quality. The periapical radiograph of the molar tooth did not show the full extent of the root. Later imaging revealed a developing apical lesion.
- The patient and patient's spouse claimed to have advised the dentist's spouse/office manager of the patient's stiff neck and difficulty swallowing. The dentist and his spouse testified at deposition that this information was not provided during

the weekend phone calls. However, the note in the patient dental healthcare information record documented only that the weekend phone calls occurred, with no further information.

Documentation of discussions with the patient (treatment plan, informed consent and telephone conversations) may have improved the potential for a defense verdict. The defense expert generally supported the treatment provided. However, the lack of diagnostic imaging, as well as failure to examine or refer the patient for medical evaluation, would be difficult to overcome based upon the content of pre-trial depositions.

Outcome:

The dentist agreed to settle the case. Total claim costs exceeded \$300,000.

Although restorative dentists may consider crown and bridge treatment to be routine, [The Dental Professional Liability Claim Report: 2nd Edition](#) notes that crown procedures are among the top five dental procedures associated with expensive claim payments (indemnity payment from \$10,000 to \$1,000,000).

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CNA Dental Risk Control



New Dental Claim Report Released!

You have invested your life in your career, all of which can be threatened by a single malpractice lawsuit or state licensing board complaint. Dentist's Advantage, in collaboration with CNA, has released their newly updated claim report: Dental Professional Liability Claim Report: 2nd Edition. Included within the report are in-depth analysis and risk management recommendations designed to help dental professionals avoid claims and improve patient outcomes.

Key findings from the 5-year study include:

- **\$134,497:** Average cost of a malpractice lawsuit against a dental professional, including legal defense costs
- **30.5%:** The increase in the average cost for a malpractice claim against a general practitioner since the 2016 claim report
- **Inadequate precautions to prevent injury:** Most common malpractice allegation against dental professionals
- **Corrective Treatment:** Procedure resulting in the highest percentage of injury claims (25.5%)
- **\$4,428:** Average legal cost to defend a dental professional from a licensing board complaint – an increase of 18.7% from the previous dataset

[Click here](#) to get your free copy of the report.

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