

## RISK MANAGEMENT ARTICLE

### 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.

#### 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.

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

### 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.

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 EPLI policy, and to take actions designed to prevent claims that will require dentists to use that coverage.

#### **RESOURCES**

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