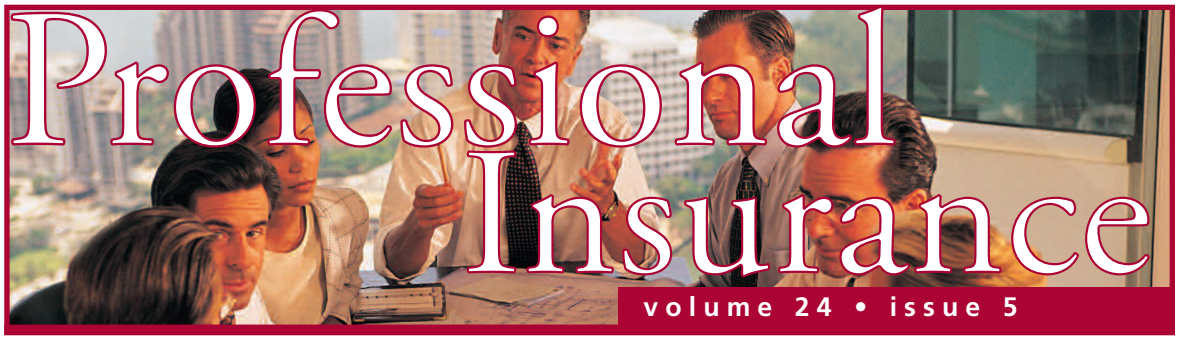

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Layoffs and Age Discrimination Liability

Turbulent economic times make younger workers especially vulnerable to job loss, according to recent Labor Department figures. Workers in their 20s and 30s are at a higher risk of layoff, with the unemployment rate for workers ages 25–34 at 9.6% in April 2009, up from 4.9% a year earlier. Workers over 55 years old felt an increase during the same time but, overall, had a lower unemployment rate, up to 6.2% compared to 3.3% a year earlier.

Younger people, in general, are a lot less likely than older counterparts to claim age discrimination when there is a reduction in force. Additionally, most states protect workers over age 40 from age discrimination, but few jurisdictions offer similar protections to workers as young as 18.

Layoffs based on lack of seniority are easier to defend. "If you have a bona fide seniority system, it's a defense" against discrimination according to the law, Gerald Hathaway of law firm Littler Mendelson told the *Wall Street Journal*. Policies on layoffs need to be documented and consistently applied, and where there are deviations from the policies, clear reasons must be given.

Before undertaking layoffs, consult your employment practices liability insurance policy for information on coverage against discriminatory termination claims. If you have any questions on your coverage, consult with your agent. ■

Both Sides of D&O Coverage

A majority of lawsuits filed against the directors and officers of a company are brought by stockholders, although, lawsuits can be brought against these individuals by others, including employees, customers, and government agencies.

Depending on state law, there may be certain circumstances in which only a portion of the cost of the lawsuit is reimbursed. For this reason, it is important that limits on the firm's directors and officers (D&O) liability insurance be reviewed to ensure adequacy. Coverage A—also called Side A—is the portion of the policy that addresses reimbursement to directors and officers for covered losses that are not paid by the company. Coverage B—also called Side B—pays the cost incurred by the company for amounts it is required to reimburse directors and officers.

Are your firm's D&O limits adequate to cover the cost of losses caused by claims against your directors and officers? We can help. For assistance in putting together a D&O policy that offers quality protection to your firm's decision makers and the company itself, call our service team today. ■

Check Your Employment Termination Practices

HR.BLR.com offers the following questions for employers who are concerned that termination could result in claims:

- Is thorough documentation on violations and investigations available?
- Is the employee aware that termination is the next step in the process?
- Is it agreed upon by senior management that the violation merits immediate discharge?
- Have others been terminated for the same violation?
- Is there a history of this employee or other workers "getting away" with similar behavior, and if so, was fair warning delivered to all that tolerance was no longer the case?
- Has the employee exercised their legal rights so as to merit a claim of retaliation in response to termination?
- Have efforts to correct behavior been documented?
- Does employee literature, such as a handbook, outline that such behavior is grounds for termination?

Affirmative answers to the above indicate your firm is in a strong position to defend itself; however, there is no guarantee that even the most rock-solid procedures will block litigation. For this reason, consider an employment practices liability insurance policy. Such insurance will help your firm with the cost of defense as well as possible judgments and/or settlements resulting from wrongful termination lawsuits. ■

EEOC Complaints on the Rise

"The Equal Employment Opportunity Commission (EEOC) must honor any and all complaints—even if they are unsubstantiated." This language from the *Federal Register* informs employers that words such as "frivolous" and "ridiculous" do not prevent a claim to the EEOC from being investigated and possibly going to trial.

As job losses grow nationwide, the EEOC has experienced a substantial rise in activity. According to the organization, discrimination claims jumped 13% from 2007 to 2008, with a record number of claims filed in 2008. Almost 26% of those were filed as age discrimination, and more than 34% include retaliation complaints.

The 2008 Jury Verdict Reports on Employment Practice Cases doesn't paint a much better picture for employers. The organization says that 61% of cases are won by employees. Further, the average overall jury award is $252,000, while the average overall settlement is $75,000. Employers must pay the cost to defend claims, which average $120,000 per claim, and if the employer loses, it often must pay the plaintiff's attorney's fees—averaging $200,000—in addition to judgments.

Numbers and statistics such as these indicate that employers continuing to do business without an employment practices liability (EPL) insurance policy are playing with fire. ■

Planning Your Year-End Bonuses

Your firm has had a good year despite the economic climate and your employees are worth retaining, so your management has decided to go ahead with bonuses for your top performers. Super!

But wait. Is your goodwill going to result in claims of discrimination from moderate or under-performers? Does that mean you have to "reward" everyone just to dodge a costly complaint?

The answer should be "no". You should be able to reward those most valuable to your firm in a special way without encountering legal challenges. The key is to structure compensation with fairness of opportunity and transparency. Your legal counsel can best advise you on creating a bonus system that doesn't run afoul of the law, but some of the basics include informing employees of the opportunities and criteria up front, evaluating performance based on the stated criteria, remunerating based on the evaluations, and keeping everything in writing.

Alternatively, you can do what one insurer up north did: The highest-level managers forswore their bonuses so that everyone under them could take home an extra $500 at Christmas. Talk about a morale booster!

If it's too late to implement a bonus plan this year, consider creating one for next year. Whatever path you choose, guard against capricious awards of bonuses and always follow best practices in all your employment actions. ■

A Claim by Any Other Name is Still a Claim

Many business owners mistakenly believe that a "claim" is a formal action by a claimant that includes forms and/or lawyers. As a result, they often fail to inform their insurers in a timely manner about developing claims. If a policyholder delays in notifying the insurer about potential claims, coverage might be denied.

How does a business avoid this situation? First, review the insurance policy for information on what is considered a claim. For example, the policy may say that "any written demand for monetary or non-monetary relief" constitutes a claim; therefore, such notice should be reported to the insurance company. In some cases, "any written notice" may include e-mail or other correspondence that generally precedes action in the court.

If a policyholder delays in notifying the insurer about potential claims, coverage might be denied.

Second, review the policy for information on when a claim must be received for coverage to apply. Most professional liability policies are provided on a "claims made" basis. This means the claim must be reported during the specified policy term. A claim reported a day after the term expires most likely removes the insurance company's duty to defend and provide coverage.

If you receive notification or action by a client that meets your policy's requirements for reporting, or if you are unsure about a complaint or demand by a client, call our service team to see if it should be reported to the insurer. ■

Disability Claims Are Wide-Ranging

Employment practices liability (EPL) insurance can be designed to protect employers from claims which allege violations of the Americans with Disabilities Act (ADA), most recently amended in September 2008. A review of the amendments highlights the broad spectrum of situations covered under the law.

Following are some of the recent changes to the ADA as reported by the U.S. Equal Employment Opportunity Commission (EEOC):

- The Act makes important changes to the definition of the term "disability." The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the ADA.
- The Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways. Most significantly, the Act:
  - Expands the definition of "major life activities" by including two non-exhaustive lists. The first list includes many activities that the EEOC has recognized (e.g., walking), as well as activities that the EEOC has not specifically recognized (e.g., reading, bending, and communicating). The second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions").
  - Clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

Watch your employment practices for actions that could be interpreted as violations of the ADA, and take steps to reduce your exposure to complaints of discrimination. ■

Thank you for your referrals.

If you're pleased with us, spread the word! We'll be happy to give the same great service to all of your friends and business associates.

Excess D&O Is Being Marketed

With concerns on the rise about directors' and officers' liability, alternatives to standard D&O policies are being marketed. If your firm is considering purchasing excess D&O insurance to increase limits available and preserve continuity of coverage, be cautious.

While some policies are designed to mirror the primary insurance, they can contain separate terms and conditions. For example, a "follow form" excess policy is designed to mirror the primary D&O policy by offering identical terms and conditions. In fact, some so-called "follow form" policy provisions contain an exception that the excess policy will pay only to the extent it does not conflict with the primary policy. The inclusion of this language means there is a possibility that the excess policy will not pay or perhaps the method of claim payment will be different.

There is no standard excess insurance policy, so be clear on how primary and excess policy terms compare. If your firm is concerned about your D&O limits, consult with our service team. It's possible we can help you without turning to the non-standard market. ■