

Market Conditions

FEBRUARY 2020

Employment Practices Liability

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As we move into 2020, headlines continue to dominate the employee-related insurance marketplace. While the trend of allegations from #MeToo, the movement focused on sexual harassment in the workplace, and #timesup, the movement focused on equality in the workplace, are keeping pace with 2019, we are seeing headlines highlighting new legislation and rules passed by more than 20 state governments. These new laws protect alleged victims and invigorate more plaintiff-friendly judges and juries, leading to a continued trend of increased defense costs, settlements and judgements, and the promise of more to come as plaintiffs' firms test out new laws and rules. Top Employment Practices Liability (EPL) insurers such as AIG, Chubb, CNA and Travelers are seeing claims frequency and severity continue to trend upward, putting upward pressure on premiums and retentions for EPL in 2020. Overall, we anticipate that most insureds will experience rate pressure in the range of 5–15% in addition to premium increase in response to increases in employee count, the number-one exposure for EPL premium rating.

States across the country are passing legislation that provides for increased liability, with changes such as limiting the use of nondisclosure agreements, extending the statutes of limitations and requiring additional sexual harassment training. Additionally, judges and juries seem increasingly sympathetic to plaintiffs. In a recent gender discrimination settlement, Los Angeles-based Riot Games agreed to a \$10 million settlement agreeable to plaintiffs, but the judge and Department of Fair Employment and Housing (DFEH) in California rejected the settlement and argue plaintiff's should be entitled to \$400 million in compensation. This is an extreme example but illustrative of a broader trend of punitive sentiment toward corporations faced with these allegations.

Another notable trend of #MeToo is that of plaintiffs bringing defamation suits or retaliation suits due to being outside of the statute of limitations for alleging sexual harassment—these claims have been brought by both the accuser and accused. Statutes on sexual misconduct can be as short as one year, so in many states the only remedy is allegations of defamation or retaliation. Retaliation continues to be the most common charge received by the Equal Employment Opportunity Commission (EEOC) in 2019 with over 50% of all charges filed including retaliation. The recently released 2019 EEOC data shows a slight decrease in sexual harassment charges, but it is notable that charges may be filed in the state agency only, so the EEOC data is not complete. States such as California, New York, Florida and Texas lead in number of sexual harassment charges.

The EPL marketplace is responding to a slight increase in frequency and severity in 2020 with moderate increases in premium rate and in retention/deductible, but severe losses will continue to impact the marketplace, as a \$5 million or \$10 million payout by many insurers has a significant impact on their profitability for EPL and leads to restricted appetite, less competition and therefore higher premiums and retentions. In California, for example, a recent EPL renewal for a company with 1,000 employees and no recent losses found no insurers willing to offer a deductible less than \$250,000. Most insurers have no desire to write new EPL policies, and the limited competition will continue into 2020. The chart below shows recent large EPL settlements that are contributing to less appetite and competition in the EPL marketplace.

Large EPL Settlements in the Last 12–24 Months (data from the EEOC website)

Company	Allegation	Settlement/award (not including defense costs)	Date
Jackson National Life Insurance	Race/national origin/sexual discrimination and retaliation	\$20 million	1/9/2020
Uber	Sexual harassment and retaliation	\$4.4 million	12/18/2019
Crossmark	ADA violations	\$2.6 million	11/21/2019
Government of Canada	Sexual harassment/gender discrimination	\$900 million	1/1/2019
Alkiviades David (individual)	Sexual harassment (assistant)	\$58 million	12/3/2019
JPMorgan Chase Bank	Racial discrimination and harassment	\$24 million	8/31/2018
City of New York	Sexual harassment/gender discrimination	\$20 million	7/18/2018

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Large EPL Settlements in the Last 12–24 Months (data from the EEOC website) continued

Company	Allegation	Settlement/award (not including defense costs)	Date
Steve Wynn (paid to shareholders, D&O)	D&O negligence/sexual harassment	\$20 million	2/26/2019
ACell Inc.	Whistleblower/retaliation	\$17.3 million	1/1/2018
Riot Games (Tencent)	Gender discrimination	\$10 million–\$400 million pending	12/3/2019
Goldman Sachs	Racial discrimination and harassment	\$10 million	9/30/2019
Dell Technologies	Racial discrimination and harassment	\$7 million	1/1/2019
Enterprise RAC Company of Baltimore, LLC	Racial discrimination and harassment	\$6.6 million	1/1/2019
Biogen	ADA/disabilities discrimination and harassment	\$6 million	7/13/18
JPMorgan Chase Bank	Sexual harassment/Gender discrimination	\$5 million	5/30/2019
JBA USA Food Company	Hiring practices	\$4 million	1/1/2018
Target Corporation	Hiring practices	\$3.7 million	1/1/2018

So far, we have not seen new restriction in policy terms, though many insurers have existing restrictions for criminal allegations, and willingness to amend or broaden this coverage is waning. It is important to also look at the exclusion for bodily injury, as sexual harassment allegations may include unwanted touching or abuse limiting coverage under the EPL. We have seen trends of insurers applying existing exclusions like these more liberally in the wake of increased losses, limiting coverage via less favorable allocation. Also, many underwriters and claims departments are operating on reduced staffing, delaying the issuance of coverage positions and reservation of rights letters on claims.

Almost all EPL policies contain exclusions for wage- and hour-related allegations, and those losses remain the largest exposure facing companies in the U.S. in 2020. In 2019 the Department of Labor (DOL) broke a record in wage and hour enforcement with total enforcement on \$322 million in unpaid wages. In New Jersey, Uber was fined \$649 million for unpaid employment taxes, and many similar fines and penalties are pending in other states.

Stand-alone and blended wage and hour policies are available in London and Bermuda, with minimum retentions of \$500,000 to \$1 million and minimum premium around \$15,000 per million of coverage. We are recommending companies with more than 250 employees consider this coverage, as this exposure continues to be significant for the next year, and even increasing in states such as California that have been passing laws like the Assembly Bill 5 (AB5) making it easier for independent contractors to claim employee status and bring wage- and hour-related litigation.

Overall, we anticipate EPL premium and retentions to continue to rise in 2020. So far, increases remain modest in the 5–15% range for rate (in addition to any exposure increase from increased employee count). However, recent severe losses may cause rates to increase beyond this range later in 2020, as losses continue to accumulate and increase, leading to restricted appetite from insurers to write new EPL policies. With the continued frequency and severity of losses, increased litigation and rules, and overall plaintiff-friendly sentiment stemming from #MeToo and #timesup, there does not appear to be any relief from increased premium and retentions on the horizon for EPL and wage and hour insurance policies.

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