

COVID-19 and Employment Practices Liability Insurance



By Natalie Douglass, Esq.



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As COVID-19 circumstances seem to change daily, so, too, do the employment issues that result. Employers are quickly responding to many different implications of COVID-19, including teleworking or other accommodations, reviewing policies and procedures, and communicating with their employees. In unprecedented fashion, all of these issues are arising at once and with urgency.



Consider the following:

- Do certain statutory provisions apply, such as the Family and Medical Leave Act (FMLA) or the Americans with Disabilities Act (ADA)?
- How do COVID-19 absences affect employee wages, and does that create an exposure to employers?
- How should employers handle employee quarantine cases with respect to employment and health-related privacy?
- What risks are created from decisions about layoff, furlough or reduction in hours?
- Can employers ask employees to refrain from personal travel that might expose them to COVID-19?
- When can employers require employees to stay home? When can employers require employees to come in to work?

All of these questions (and more) require the advice of counsel. Many employment lawyers are offering sound, general advice¹ that provides good starting points for consideration. Keep in mind, however, that employment law tends to be very fact-specific, and risk managers, legal departments and HR professionals are encouraged to consult specialized employment counsel on their specific questions. In addition, employers should also consult the updated EEOC and DOL guidance on COVID-19 and its employment implications.² It has also been reported that new paid leave legislation has been proposed as a result of COVID-19, but that the bill has changed considerably since it was first drafted.³ Employers should also consult with employment counsel on the applicability and impact of any new legislation passed regarding COVID-19.

Employment Practices Liability (“EPL”) insurance policies can serve two valuable purposes for those concerned with COVID-19-related employment claims. First, many EPL policies provide free preclaim legal advice from highly qualified employment counsel free of charge to their policyholders. If you need assistance in quickly deploying policies and procedures to address this issue in your workplace, it might be a great place to start. If you have employment counsel that advises your business, contact them with more specific questions about the implications of your current policies and procedures in light of COVID-19.

¹ See <https://www.fmlainsights.com/when-are-employees-entitled-to-fmla-leave-related-to-coronavirus-and-can-an-employee-with-no-symptoms-be-forced-off-work/>. See also <https://www.littler.com/coronavirus>

² See https://www.eeoc.gov/facts/pandemic_flu.html. See also <https://www.dol.gov/coronavirus>.

³ <https://www.newsweek.com/families-first-coronavirus-bill-sent-senate-stripped-back-sick-leave-benefits-1492958>

Additionally, EPL policies can provide coverage for some of the anticipated COVID-19 employment claims. There is no standard EPL policy, and coverage terms, conditions and exclusions vary within the EPL market. You should review the terms and conditions of your actual policy to determine how your coverage might respond to any allegations made against your company for employment actions taken regarding COVID-19. That said, certain generally relevant provisions to consider with respect to COVID-19 EPL claims include:

- **Definition of employment wrongful acts:** To trigger the insuring agreement, a claim must allege an employment wrongful act, which typically includes claims alleging employment-related invasion of privacy or defamation, discrimination, harassment, retaliation or violation of FMLA, all of which appear to be relevant to possible COVID-19-related employment claims.
- **Definition of loss:** If triggered, the policy pays only covered loss, as defined by the policy. Typically loss does not include any costs to comply with injunctive relief, costs of accommodations associated with disabilities, or other protected status, benefits due, or salary obligations (provided, however, that front pay and back pay are typically covered in the definition of loss).

Certain exclusions in EPL policies may become relevant. Again, there is no standard EPL policy, and language varies greatly from one form to the next, but some exclusions to consider are:

- **Bodily injury exclusion:** COVID-19 claims could include allegations involving bodily injury. Most EPL policies contain exclusions for loss related to bodily injury. The scope of applicability to a claim depends on whether the policy excludes claims **for** bodily injury or whether it excludes all claims **arising out of** bodily injury.
- **Wage and hour exclusion:** Some EPL policies contain a small defense cost sublimit. In the absence of that sublimit, wage and hour claims are largely excluded from EPL policies unless you purchase special wage and hour insurance products. To the extent that COVID-19 claims arise from certain leave or quarantine measures that impact pay, this exclusion may become relevant.

It is unclear how COVID-19 will impact the EPL insurance market. We anticipate that underwriters will ask for more information in the upcoming renewal cycle relating to COVID-19, but otherwise we do not foresee any specific COVID-19-related exclusions to be introduced. Because the COVID-19 pandemic is fluid and changing each day, so, too, are the implications of its spread. As always, Gallagher will continue to monitor this issue and advise our clients accordingly.

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