

## EMPLOYMENT PRACTICES LIABILITY IN THE AGE OF #METOO

### CONTACT

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### ABOUT THE AUTHOR

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ON YOUR TEAM.

When people interact – regardless of the setting – what individuals say or do to each other isn't always going to be perceived as appropriate. People are not perfect, and mistakes are made. However, some actions are far worse than others. Our interconnectivity and 24/7 access to social media adds not only a new arena in which to misbehave, but also creates a new vehicle by which to rapidly spread awareness of a person's misbehavior. A simple hashtag can now create a wave of awareness that can significantly impact corporations, institutions or individuals. Most recently, the #MeToo movement has shaken organizations like Fox News, ABC, NBC, NFL Network, NPR and Vox Media. The movement stands to significantly impact our culture, as it has opened up a long overdue discussion about the frequency of sexual assault, discrimination and harassment, especially in the workplace.

### THE RISE OF EMPLOYMENT PRACTICES LIABILITY INSURANCE POLICIES

In 1991, sexual harassment gained attention and increased public awareness in when law professor Anita Hill accused her former boss and then-Supreme Court nominee Clarence Thomas of sexual harassment. At the time, only five insurance companies offered Employment Practices Liability Insurance (EPLI) policies covering sexual harassment and discrimination in the workplace, according to the *Betterley Report*, an insurance market report which tracks insurance trends. In the aftermath of Anita Hill's public claims, the sale of EPLI policies increased steadily. The Thomas confirmation hearings raised awareness of the risk that companies face. In anticipation of sexual discrimination and harassment claims, companies big and small rushed out to purchase insurance to protect against both the costs associated with defending allegations of and actual damages for sexual harassment claims. Today, AmWINS places EPL accounts with over 75 insurers.

Over the past few months, the #MeToo movement has again exposed unacceptable predatory behavior in the workplace. It has also shown that there is no room for tolerance where sexual harassment exists. Companies must be ready to quickly address sexual harassment, assault and discrimination in the workplace as it is uncovered. A movement that started out in very high-profile, public industries and in politics will soon spread into the hallways of everyday American businesses.

### TYPES OF WORKPLACE SEXUAL HARASSMENT

What established liability for inappropriate behavior? Title VII of the Civil Rights Act of 1964 is the federal law which prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, or religion. Sexual harassment is a form of sex discrimination in violation of Title VII. Sexual harassment includes, but is not limited to, unwelcome sexual advances, requests for sexual favors, and visual, verbal or physical conduct that is sexual in nature. Generally, there are two types of workplace sexual harassment: (1) Quid pro quo and (2) hostile work environment.

**1. Quid pro quo harassment** occurs when sexual advances, contact and/or actions are made as a condition of employment, i.e. to receive, keep or advance in a job or receive certain benefits, promotions or privileges. *Examples include a supervisor threatening termination of an employee unless the employee performs sexual favors or a manager promising promotion or salary increase in return for engaging in sexual activity.*

If allegations are proven, employers are almost always held strictly liable for quid pro quo sexual harassment. Managers and supervisors who commit quid pro quo harassment are viewed as agents of their employers. What does it mean to be strictly liable for the conduct of a manager or supervisor? As an employer, you will not have a valid defense.

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**2.** Hostile work environment involves behavior of a sexual nature by another employee or a supervisor that is severe or pervasive enough to create an intimidating workplace environment that affects the employee's ability (a reasonable person standard) to perform his or her job duties. *Examples include sharing sexually explicit pictures or other materials, vulgar or other offensive language, personal questions of a sexual nature, obscene jokes, or physical conduct that is sexual or degrading.*

## PROTECTION PROVIDED THROUGH EPLI POLICIES

Sexual harassment laws apply to employers of all sizes. It doesn't matter whether you employ two employees or operate a corporation with thousands of employees; employers are subject to federal, state and/or local laws prohibiting harassment and discrimination. The individual state or local laws usually afford protection to a wider range of categories of employees, as well as expand the list of protected status beyond the traditional age, gender, disability, etc. The intent of these laws is to deter discrimination against any person in the workplace, as well as to define the rights of employees, the violation of which can lead to litigation.

Employment Practices Liability and related litigation represents an increasing cost of corporate legal liability year over year. The extreme social awareness and sensitivity associated with sexual harassment claims may itself increase the cost of litigation. As employers attempt to protect the organization and its employees, they are also trying to reconcile tough issues in our culture. Employers need to protect themselves financially from liability but also create a safe work environment. In addition, in order to provide a legal defense and pay damages, the EPLI policy may include resources to help business owners create policies and procedures, training, and awareness campaigns which may reduce the potential for future claims.

In addition to sexual harassment and discrimination, the EPLI policy also provides protection against many kinds of employee lawsuits, including allegations of:

- Discrimination based on age, race, sex, gender, religion
- Wrongful termination
- Breach of employment contract
- Negligent evaluation
- Negligent compensation
- Failure to employ or promote
- Wrongful discipline
- Deprivation of career opportunity
- Emotional distress or mental anguish
- Invasion of privacy

## MITIGATING SEXUAL HARASSMENT RISKS

Sexual harassment in the workplace is one of the most common employment issues employers face, despite being the most frequent written policy and training offered to managers, supervisors and employees in the workplace. In fact, in states like California, employers with 50 or more employees are required to provide two hours of sexual harassment prevention training to all supervisors every two years.

With daily revelations of an unexpected workplace predator, employers are renewing their focus on the value of EPLI coverage. As a leading broker of EPLI, AmWINS expects to see premiums rise due to an increase in claims frequency and severity, more first-time buyers in the marketplace, and more current buyers looking for higher limits.

In addition to purchasing insurance to mitigate losses, how can employers do their part to help prevent sexual harassment and other sexual behavior that is seemingly a dark part of our workplace culture? Companies must address sexual harassment through anti-harassment policies and sexual harassment prevention training with the goal of ending harassment rather than just attempting to avoid litigation. Employers must not only create and communicate sexual harassment policies, but also promptly investigate all sexual harassment claims seriously and consistently, no matter what title either party holds. The training should be continuous and engaging. Employers need to be part of the solution in order to eliminate sexual harassment.

Companies do not have to tackle this issue alone. EPLI policies offer benefits beyond defending and covering losses. In fact, most insurance carriers offer free risk management and loss preventions services to each policyholder, providing comprehensive tools to assist the organization in managing and mitigating risk. Benefits include onboarding legal evaluations, 24/7 helplines, sexual harassment and ethics training courses available to the entire organization, white papers, legal services, and employee handbook assistance, along with many other relevant resources to enable the policy holder to develop a positive work environment. These products and services can help protect an organization from costly litigation.

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## STATUTE OF LIMITATIONS AND CLAIMS REPORTING

While it is important to make every attempt to prevent future losses and to purchase insurance to pay for them in the event that they occur, companies may still be liable for incidents that occurred in the past. Recent allegations that have appeared in the news have referenced events that took place decades ago. Statutes of limitations vary by state, and companies may still be responsible for transgressions going back many years. It is therefore essential to ensure that your EPLI policy has full prior acts coverage.

It's also important to report all matters to your insurer if you have EPLI. All policies have a late-notice limitation, as well as different definitions of what constitutes a claim or circumstance. The safest advice is to report all threats, letters from the EEOC, DFEH or other regulatory agencies, or any situation that just doesn't feel right. It's better to have the insurer decide what is a covered claim rather than having to dispute the timeliness of reporting the circumstance.

## CONCLUSION

In 2017, the issue of sexual harassment – especially in the workplace – gained greater awareness as accusations of harassment by high-profile individuals were constantly in the news. In many cases, sexual harassment lawsuits seriously impacted businesses and their respective insurers. As societal tolerance of sexual harassment decreases, employers must consider the risks to their business as a result of harassment committed by an employee. Partnering with an expert in Employment Practices Liability coverage is essential to preventing and mitigating claims that could have a significant detrimental impact on a corporation.

Contact AmWINS to learn more about industry leading EPLI products that help deliver specialization to your clients today.

