

**FAQ's –**

**Employment Practices  
Liability and Directors &  
Officers Liability  
in a COVID-19 Working  
Environment**

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# EMPLOYMENT PRACTICES LIABILITY IN A COVID-19 WORKING ENVIRONMENT

Generally, Employment Practices Liability Insurance, or EPLI, responds to employee claims against an employer for, among other things, harassment, discrimination, retaliation, whistleblower, and/or wrongful termination. Claims most frequently come in the form of a demand letter, Charge of Discrimination, or lawsuit.

*EPLI policies vary both in design and scope. Therefore, employers should check their policy to identify specific coverages, limitations, and exclusions. Answers to these FAQs are merely generalizations and are not guarantees or promises of coverage. Employers should work with their broker to review their EPLI policies and identify exclusions, limitations, and carvebacks.*

## What is Employment Practices Liability Insurance?

EPLI is the insurance that generally responds to employee causes of action against an employer for certain and specific employment related claims such as harassment, discrimination, and/or wrongful termination.

**EPLI in a COVID working environment.** Employee initiated litigation is on the rise during this COVID crisis. Employers are the target of a significant flurry of litigation including a variety of causes of action. Employers' EPLI programs are especially important in an environment of heightened employee legal activity.

## Are there claims or causes of action that may not be covered by EPLI?

**Yes.** Coverages and exclusions vary by policy. Often, EPLI programs exclude coverage for [Occupational Safety and Health Act \(OHSA\)](#), bodily injury, criminal/fraudulent acts, third-parties, wage and hour ([Fair Labor Standards Act - FLSA](#)), and the [Family and Medical Leave Act \(FMLA\)](#). EPLI policies exclude coverage for actual or alleged violation of the responsibilities imposed by these Acts, with a carve-back for employment claims for retaliation. Such exclusions are standard in the EPL insuring agreement and not a coverage exclusion as a result of COVID.

**Coverage in a COVID working environment.** Much of the recent legal action taken against employers is rooted in health and safety in the workplace, failure to pay wages (including overtime and emergency paid sick leave), violations of the FMLA (interference or retaliation), and mass layoffs/WARN Act. We cover each of these in more detail below.



## Are violations (or alleged violations) of Occupational Safety and Health Act (OSHA) covered by my EPLI Policy?

**No.** Almost all EPLI policies exclude alleged or actual OSHA violations. Most often, the exclusion includes defense costs, related losses, and/or settlements. However, there is a carve-back for employment claims for retaliation (i.e. wrongful termination in connection with an employee exercising their rights under OSHA).

**OSHA claims in a COVID working environment.** OSHA is the agency that oversees the body of laws regulating safety in the workplace. In addition to rules that apply to all industries, OSHA also promulgates industry specific rules. OSHA rules require that employees seeking enforcement file a complaint directly with OSHA. Consequently, employees who believe they have been subjected to unsafe working environment with respect to COVID should seek remedies through OSHA. Filing a complaint with OSHA will generally trigger an investigation into the employer's safety practices. Employers may incur a variety of expenses associated with responding to the investigation and any penalties that may ensue. Most EPLI policies generally exclude any and all government penalties and fines. Additionally, because most EPLI policies exclude OSHA claims, fees and costs (such as attorney or consulting fees) associated with a response to an OSHA investigation would likewise be excluded.

## Does EPLI respond to claims that an employee became infected with COVID-19 in the workplace?

**Maybe.** Bodily injury is a standard exclusion in the EPL form usually with a carve-back for emotional distress, mental anguish, or humiliation. Therefore, if an employee sues an employer for bodily injuries associated with COVID-19, the EPLI insurance likely will not provide coverage.

However, there has been a surge of negligence and public nuisance claims against employers alleging that the employer breached its duty to their employees to provide a safe working environment. While an EPLI policy may respond to a negligence and/or public nuisance claim, the Directors and Officers insurance may also respond, depending on policy terms, conditions and exclusions.

**Negligence claims in a COVID working environment.** One of the more prevalent causes of action today are allegations for failure to provide a safe working environment. Employees allege that the employer breached its duty to provide a safe working environment and consequently, the employee contracted COVID-19 and suffered a harm or damage. Coverage may hinge on the nature of the claims and allegations. In some cases, the courts have dismissed the civil negligence action sending the employee to administrative process required by OSHA. As explained above, OSHA claims are generally excluded in an EPLI policy.



## Will EPLI respond to wage and hour/Fair Labor Standards Act claims?

**Maybe.** Typical EPL policy will exclude violations or alleged violations of wage and hour and FLSA. Some policies provide a carve-back of sub-limited defense costs [reimbursement] to address these allegations (limits are generally between \$50K - \$150K with very few at \$250K max.). In today's market, some carriers remove this altogether, especially on certain classes of business where hourly workers are more prevalent. Unless otherwise noted, the exclusion usually has a carve-back that it will not apply to otherwise covered employment claims for retaliatory treatment as defined by the policy form.

**Wage and Hour/FMLA claims in a COVID working environment.** Recent COVID crisis legislation provides employees with Emergency Paid Sick Leave which is regulated by the FLSA. The Department of Labor (DOL), enforces the FLSA. There has been a flurry of complaints filed with the DOL and lawsuits against employers for failure to pay Emergency Paid Sick Leave and Emergency Paid Family Leave.

Additionally, the recent and rapid changes in the working environment has led to significant claims for "failure to pay wages" under the FLSA. For example, employees working from home may not be logging all hours worked. Most often, employees claim that the employer has failed to pay wages and/or pay overtime. Employers with EPLI policies that exclude FLSA claims may face significant financial exposure for these claims.

## Will EPLI respond to claims associated with a leave of absence such as FMLA and/or Emergency Paid Sick Leave and/or Emergency Family Medical Leave?

**Maybe.** Coverage for FMLA and related leave of absence claims varies by EPLI policy. Many EPLI policies have an FMLA exclusion or carve-out. In fact, many policies specifically exclude both defense costs and losses/settlements in connection with an FMLA claim. However, like OSHA claims, many EPLI policies will include a carve-back for "retaliation" in the event an employee claims that he/she experienced adverse action associated with seeking his/her rights under FMLA.

**FMLA claims in a COVID working environment.** FMLA has been in the spotlight during the COVID crisis. Among other qualifying events, FMLA provides job restoration rights to employees who personally, or may have an immediate family member, experience a serious health condition (as defined by the FMLA). Additionally, legislation passed during the COVID-19 crisis expanded the use of FMLA providing employees with "emergency FMLA" leave in response to day-care, camp, and/or school closures. Consequently, the FMLA has taken center stage in this COVID working environment. Likewise, so have the FMLA claims. Employers with EPLI policies that exclude FMLA coverage may face significant financial exposure for these claims.



## Does EPLI respond to claims for mass layoffs or Worker Adjustment and Retraining Notice Act (WARN Act)?

**Generally, No.** As a result of the COVID crisis, many companies are laying off workers. In some cases, depending on the scope and size of the layoff, the employer may be subject to the WARN Act which requires certain advanced notice to employees. Likewise, some states have their own equivalent of WARN Act requirements. Oftentimes, employees will bring claims against their previous employer for failure to adhere to the WARN Act (or state equivalent) requirements. Most EPLI policies do not respond to claims associated with WARN Act (or state equivalent) violations.

**Layoff/WARN Act claims in a COVID working environment.** Most especially in the beginning of the COVID crisis, many employers saw an immediate drop (or complete elimination) of all business activity and revenue. As a result, many employers immediately laid-off a portion or all of their workforce. Consequently, employers subject to the WARN Act were not able to provide the necessary and required advanced notice to employees. Employees have filed suits and complaints against employers for failure to comply with the WARN Act requirements. Most employers are left without insurance to respond to these WARN Act claims.

In the current marketplace, numerous carriers have been trying to impose attaching new terms for mass layoff/reduction in force (i.e.-sublimit of coverage with higher retention threshold and coinsurance). As to violations and alleged violations of WARN Act, always excluded with a carve-back on employment claims for retaliation.


## DIRECTORS & OFFICERS LIABILITY IN A COVID-19 WORKING ENVIRONMENT

### What is Directors & Officers Liability Insurance?

Directors and officers (D&O) liability insurance protects the personal assets of corporate directors, officers, employees, and their spouses, in the event they are personally sued by employees, vendors, competitors, investors, customers, regulatory bodies or other parties, for actual or alleged wrongful acts in managing a company.

The insurance, which usually protects the company as well, covers legal fees, settlements, and other costs. D&O insurance is the financial backing for a standard indemnification provision, which holds officers harmless for losses due to their role in the company.

**D&O in a COVID working environment.** It is not unusual to see an increase in D&O claims during a period of economic hardship or recession. With the country's economic future



continuing to remain uncertain, we expect to see a heightened risk of D&O lawsuits in the future. Moreover, with a potential global recession on the horizon, bankruptcies have and will continue to disrupt entire industries. As a result, the advancement and indemnification protections executives rely on to personally protect themselves may not be available if needed. D&O coverage may be the only protection available, making it more important than ever.

## What types of COVID-19 related claims would you expect to trigger D&O insurance?

- Direct and derivative securities claims and class actions arising out of COVID-19 financial reporting obligations or public statements about a company's response to the pandemic, alleged board failure to manage the business impact from COVID-19, or other alleged management-related acts resulting in a diminution of share value or other economic losses;
- Antitrust lawsuits alleging price-gouging or price-fixing against publicly traded companies;
- Regulatory investigations in connection with SEC reporting and disclosure requirements, unfair trade practice claims, alleged misrepresentation and accounting issues, and claims under the False Claims Act and Foreign Corrupt Practices Act; and
- Claims by creditors, trustees, shareholders, and other stakeholders post-petition in bankruptcy.

To be clear, D&O wording is not likely to speak to specific risks associated with COVID-19, but most policies will respond to traditional D&O perils, including those triggered by COVID-19 events.

## Does D&O insurance provide any additional coverage to private companies?

**Yes.** Unlike public company D&O, private companies have broad entity coverage that would likely be triggered by negligence-based claims, for example: negligence in risk mitigation, preparedness and response to COVID-19. Depending on the wording of the policy, D&O may also extend to government investigations and inquiries.



## Does D&O insurance cover bodily injury claims?

**Generally, No.** D&O policies typically exclude coverage for bodily injury, including disease, as this is more typically covered by general liability insurance. Still, D&O insurance could provide coverage for certain lawsuits, including claims of negligence in developing and implementing appropriate COVID-19 guidelines and procedures, although there may not be coverage under a D&O policy for the resulting bodily injury.

## Does D&O Insurance cover business interruption due to the COVID-19 pandemic?

**Generally, No.** D&O policies do not cover first party business interruption exposures. Should a company experience a temporary or permanent shutdown of business, neither public nor private company D&O insurance would afford coverage. However, a third-party liability claim arising out of a business shutdown could potentially be covered.

## HUB is here to help.

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