

WAGE AND HOUR DISPUTES: TAKE PROACTIVE MEASURES TO MINIMIZE **YOUR** RISK

As we turn the calendar to 2016, there is one trend in the workplace that is not likely to decline. Wage and hour claims continued to rise in 2015, and 2016 has potential to be a record setting year for lawsuits. Countless television advertisements and highway billboard signs draw attention to this matter, but there are complexities and confusion that bring employers into unfair lawsuits. Last year the Department of Labor (DOL) proposed a rule that would update the regulations governing the white collar exemptions to the Fair Labor Standards Act (FLSA), and published new guidance on the classification of workers as independent contractors. In addition to the federal developments, employers are also facing minimum wage increases in cities and states across the country. These developments are creating confusion and uncertainty for employers nationwide. To counter these nationwide trends, businesses should have a proactive plan in place that includes a thoughtful self-audit process to ensure compliance and a comprehensive Employment Practices Liability Insurance (EPL) policy using an experienced agent to transfer some of the risk of potential violations.

SELF AUDITS

Businesses must be proactive in light of the evolving wage and hour landscape. Long before a government investigation begins or a lawsuit is filed, there are preventative measures that employers should take to minimize their exposure. One of those measures includes the review of current and prior 1099's to ensure persons classified as independent contractors were not, in fact, employees. Employers should also examine and update all job descriptions to accurately reflect the work done. Payroll records and written policies and procedures should be current, accurate, and compliant; including evolving minimum wages. These are just a few of the many self-audit techniques employers should use to prevent errors from escalating into major concerns.

EPL INSURANCE PRODUCTS

In addition to this audit plan, many employers rely on Employment Practices Liability Insurance (EPL) to minimize the potential impact of wage and hour disputes on their businesses. EPL emerged in response to the passage of the Civil Rights Act of 1991. This law allowed punitive damages

to be awarded in employment discrimination cases and provided jury trials in cases of discrimination. Historically, juries have been more sympathetic to employees than they are to employers. These heightened exposures paved the way for an increase in employee civil rights lawsuits and created the need for an insurance product to protect against claims alleging discrimination, wrongful termination and sexual harassment. Traditionally, coverage was provided only for the aforementioned discrimination, wrongful termination and sexual harassment, but with the rise of wage and hour law litigation, some insurers rushed to provide coverage under their EPL policies. After experiencing dire losses, these insurers retracted coverage a short time later.

Today, those employers relying on an EPL insurance policy to provide wage and hour coverage could be making a costly miscalculation. There are some insurers in the market place willing to cover wage and hour disputes, but only the defense costs associated with these claims. Additionally, these insurers offer much smaller sub-limits for this coverage, \$100,000 on average. Recently, stand alone Wage and Hour policies have become available on a limited basis and coverages are unique to each insurer. The criteria used to determine coverage levels offered includes, industry, business size, and state. In some industries, such as hospitality and healthcare, this coverage can be costly if offered at all. Businesses must be aware that costly wage and hour penalties are not covered by an EPL policy.

PARTNERING WITH AN AGENT

Businesses can transfer some of this risk to insurers that are willing to provide coverage for defense costs for these disputes. Many insurers won't initially offer wage and hour coverage, but will often times provide an "off the shelf" policy. This practice highlights the importance of partnering with an insurance agent that's informed and current on the complexities and evolving marketplace for EPL insurance products. Since EPL insurance products are customizable, adept agents are aware of the coverage enhancements insurers will agree to. An agent's aggressive negotiation with insurers leads to the broadest wage and hour coverage available with minimum impact to premiums.

One thing is certain, wage and hour disputes will continue to rise in 2016 but employers can take proactive measures. By implementing a simple audit plan, purchasing an EPL policy and partnering with a knowledgeable agent, businesses minimize their risks and impact of costly wage and hour claims.

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