A number of employment-related claims can arise in agribusiness and farming operations. Using scenarios, this session will identify the causes of action, the basis for claims, and the costs of federal and state litigation. It will also discuss the coverages available, deductibles, combined claims, and reservations of rights issues.
Notes

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Employment Law Claims and Insurance Policy-Related Issues for Agribusiness

How to anticipate issues, consider exposures, address traditional coverage limitations, and share knowledge with your ag clients

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Increasing Employment Law Exposures in Agriculture

The legal exposure for employment law claims can be very high for your clients, with mandatory attorney’s fee awarded to the attorney representing the workers against your client, even if only one of many claims is proven, or if only a portion of the amount sought is awarded.

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Title VII, The Civil Rights Act of 1964

UNLAWFUL EMPLOYMENT PRACTICES
SEC. 2000e–2. [Section 703]
(a) Employer practices

It shall be an unlawful employment practice for an employer
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

Title VII and Insurance Policy Coverage

• Employment practices liability insurance (EPLI) policies cover Title VII claims brought under the Civil Rights Act of 1964 in two ways. Policies cover discrimination based on:
  • “... race, color, religion, creed, genetic information, age, sex, disability, marital status, national origin, pregnancy, HIV status, sexual orientation or preference, Vietnam Era Status ...,” and
  • discrimination based on any other class “protected pursuant to any federal, state, or local statutory or common law”

NOTE: All policy language quoted herein is from Chubb Insurance Co.’s Forefront Portfolio 3.0 Policy; Employment Practices Section; 14–02–1727 (12/2010).
Americans with Disabilities Act (ADA)

- Civil rights law that makes sure that people with disabilities have the same rights and opportunities as everyone else
  - Prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public
  - Gives civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion
  - Guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, state and local government services, and telecommunications

ADA and Insurance Coverage

- EPLI policies cover claims alleging discrimination on the basis of disability in much the same way as they cover Title VII claims made under the Civil Rights Act of 1964.
- The policies routinely cover
  - Discrimination based on disability (as noted earlier)
  - Discrimination prohibited by any other applicable federal, state, or local statutory or common law

BUT with one big caveat...
The ADA Exclusion

• Virtually every EPLI policy on today’s market contains an exclusion for ADA-related compliance/accommodation costs, worded as follows.
  • “costs associated with providing any accommodation for persons with disabilities or any other status which is protected under any applicable federal, state, or local statutory law or common law including, the Americans with Disabilities Act ... however, this exclusion shall not apply to defense costs.”

• Application of the exclusion
  • EPLI policy **excludes** coverage for the cost to install a wheelchair ramp, for example.
  • BUT it will cover cost to **defend** a claim alleging an ADA violation—which often exceeds actual damages!

Pregnancy Discrimination Act

• Title VII was amended to prohibit sex discrimination on the basis of pregnancy.
• The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise.
Age Discrimination in Employment Act (ADEA)

• Protects certain applicants and employees 40 years of age and older from discrimination on the basis of age in hiring; promotion; discharge; compensation; or terms, conditions, or privileges of employment
• Enforced by the Equal Employment Opportunity Commission (EEOC)

Family Medical Leave Act (FMLA)

• Provides certain employees with up to 12 weeks of unpaid, job-protected leave per year
• Requires that their group health benefits be maintained during the leave
• Employees are eligible for FMLA leave if
  • they have worked for their employer at least 12 months and at least 1,250 hours over the past 12 months, and
  • they work at a location where the company employs 50 or more employees within 75 miles.
• Whether an employee has worked the minimum 1,250 hours of service is determined according to Fair Labor Standards Act (FLSA) principles for determining compensable hours of work.
Family Medical Leave Act (FMLA) (cont’d)

- Applies to all public agencies, all public and private elementary and secondary schools, and companies with 50 or more employees
- Employers must provide an eligible employee with up to 12 weeks of unpaid leave each year for any of the following reasons.
  - Birth and care of the newborn child of an employee
  - Placement with an employee of a child for adoption or foster care
  - Caring for an immediate family member (spouse, child, or parent) with a serious health condition
  - Taking medical leave when the employee is unable to work because of a serious health condition

Coverage for Pregnancy Discrimination, Age Discrimination, and Family and Medical Leave Acts

- Coverage for violation of all three Acts is available under virtually every EPLI policy form (as noted earlier in Title VII slide), using two approaches.
  - As a covered *type* of discrimination, **and**
  - As a form of discrimination prohibited by federal, state, or local *statute* or by *common law* (i.e., case law)
Retaliation for All of the Above Claim Types

• Three elements of retaliation*
  • Protected activity (employee complains about sexual harassment to HR department)
  • Adverse action (employee is demoted or treated unfairly after making complaint)
  • Causal connection (employee can prove that treatment was because of his or her complaint)

*Fortunately, retaliation is covered by EPL policies.

Retaliation Claims

• Any adverse action—however slight—by an employer can be perceived by an employee as retaliation, including the following.
  • Demotion
  • Failure to promote
  • Lower evaluation than prior year
  • Change of hours
  • Change of office or work space
  • Change of title
  • Change (reduction) of job responsibilities
  • Shunning (e.g., manager no longer goes out to lunch with employee)
  • Not making eye contact with employee in the hallway (an actual case!)
Retaliation Claims (cont’d)

- Largest/fastest-growing employment claim type
  - 42,018 of the 97,443 charges filed with the EEOC in 2016
  - 45.9% of all claims!
- Retaliation is usually brought in combination with another claim type.
- Example: A female employee complains of discrimination after a promotion is given to a less-qualified male. Following the complaint, her hours changed from 7a.m.–3p.m. to 11p.m.–7a.m. (the graveyard shift). The lawsuit asserts discrimination and retaliation. Ultimately, the discrimination claim is dismissed, but the retaliation claim is held to be valid.
- Retaliation claimants are often successful even if the “underlying” claim has no merit, as in this example, which is why they are so significant!

Retaliation Coverage

- Retaliation is a peril covered by virtually all EPLI policy forms.
- Typical “retaliation” definition covers claims when employees are retaliated against for
  - Exercising available rights
  - Refusing to violate a law
  - Opposing any unlawful practice
  - Testifying against the employer about violations of law
  - Disclosing (or threatening to disclose) violations of law to governmental agency (i.e., whistleblowing)
  - Filing a claim against the company under the Federal False Claims Act
Workers Compensation Retaliation

• If an injured worker is fired in close proximity to their workplace accident, the injured worker can have an additional cause of action against their employer for workers compensation retaliation.

Workers Compensation Retaliation (cont’d)

• EPLI policies exclude workers comp claims but affirmatively cover claims alleging employer retaliation for filing a workers comp claim.

“The Company shall not be liable for Loss on account of any Claim ... for any obligation of any Insured pursuant to any workers compensation, unemployment insurance, social security, disability benefits or any similar federal, state, or local statutory law or common law anywhere in the world, provided that this Exclusion (E) shall not apply to Loss on account of any Employment Claim for Retaliation.”
Fair Labor Standards Act (FLSA)

• The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in federal, state, and local governments.

• FLSA Minimum Wage
  • Federal minimum wage is $7.25 per hour, effective July 24, 2009.
  • Many states also have minimum wage laws.
  • In cases where an employee is subject to both state and federal minimum wage laws, the employee is entitled to the higher minimum wage (i.e., the state law).

• FLSA Overtime
  • Covered nonexempt (i.e., eligible for overtime) employees must receive overtime pay for hours worked over 40 per workweek (any fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods) at a rate not less than one and one-half times the regular rate of pay.
  • There is no limit on the number of hours employees 16 years or older may work in any workweek.
  • The FLSA does not require overtime pay for work on weekends, holidays, or regular days of rest, unless overtime is worked on such days.

Fair Labor Standards Act (FLSA) (cont’d)

• Employers are required to keep records of hours worked.
  • Hours worked ordinarily includes all the time during which an employee is required to be on the employer’s premises, on duty, or at a prescribed workplace.

• Employers must display an official poster outlining the requirements of the FLSA.

• Employers must also keep employee time and pay records.
Wage and Hour Insurance
Private Litigation Exposure

• Wage and hour claims, typically brought under the FLSA, were the single largest employment practices-related exposure in 2016.
  • In 2016, 8,308 FLSA lawsuits were filed.
    • The number of filings is expected to increase over the next few years, with no crest in sight.
    • In 2002, there were only 2,035 FLSA lawsuits filed.
  • The top 10 private settlements in 2016 totaled $695.5—approximately a 50% increase over the top 10 total of $463.6M in 2015.
    • These figures do not include defense costs, state claims, or claims brought by the DOL.

FLSA Claim Coverage: Two Sources

• Defense-only coverage within standard EPL polices
  • Available as an endorsement to standard EPLI policies
  • $50,000–$250,000 in defense coverage for wage and hour claims
  • Key drawbacks
    • Covers defense but not indemnity
    • Available only as a sublimit/doesn’t create additional limit

• Stand-alone wage and hour coverage
  • Has become readily available in the past several years
  • Can be combined with “standard” EPLI policies
  • Key drawback
    • Minimum $250K SIR; sometimes as high as $5 million
Increasing Employment Law Exposure

• Agencies and courts increasingly finding temporary employees and independent contractors are “employees.”
• DOL administrator David Weil issued “guidance” on using the “economic realities” test and its seven factors to determine whether someone is an employee or an independent contractor.
  • https://www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm
• Consider a wage and hour audit to identify possible misclassification situations, thus mitigating (although not eliminating) the exposure.

Independent Contractors & EPLI

Does an EPLI policy cover an independent contractor (IC)?
• Yes, but
  • Only while the IC is acting as an IC for that particular employer, and
  • Only if the employer agrees to indemnify the IC in the same manner as it indemnifies its own employees, in the event of a claim.

Does an EPLI policy cover an employee who has been misclassified as an independent contractor?
• Most likely not
  • As above, coverage applies only when the employer agrees to indemnify the IC, which it rarely does if a person is considered an IC.
Covering Independent Contractors Under EPLI Policies

Requires Five Steps

1. Insured must agree to *indemnify* the IC for liability in conjunction with the IC’s work for the insured
2. Insured must *notify* the insurer of its desire to cover the IC
3. Insured must *present evidence* of indemnification of the IC to the insurer
4. Insurer will *endorse* the policy to cover the IC
5. Insurer will *charge* additional premium to cover the IC

**Key Point:** IC coverage is *not* automatic. The insured must *request* it from the insurer.

EPLI Policy Coverage Recap

- Chubb’s ForeFront Portfolio 3.0 policy defines a covered “Employment Practices Wrongful Act” as any actual or alleged
  - breach of employment contract,
  - employment discrimination,
  - employment harassment,
  - retaliation,
  - workplace tort, or
  - wrongful employment decision.
- Except for a handful of exclusions (notably wage and hour claims), coverage under the typical policy is generally quite broad.
Risk Management

• How are your clients managing their risk?

• What policies do they have in place?

• What other policies should be offered to manage their risk?

Risk Management (cont’d)

• Hire effectively
  • Test for job-specific skills and personality
  • Check references and criminal background
  • Learn effective interviewing techniques
  • Have multiple people within the company interview candidates
  • Hire slowly

• Use protective legal documents
  • Have employees sign
    • “At will” statements
    • Mandatory arbitration agreements
    • Class action waivers (if permitted in applicable jurisdiction)
  • Avoid implied promises of permanent employment in company materials
  • Have experienced legal counsel review all employer-produced material, including employee handbooks and standard offer letters
Risk Management (cont’d)

• Best practices for Human Resources management
  • Carefully select and train first-line managers/supervisors
  • Investigate employee complaints promptly—don’t bury bad news
  • Conduct periodic—and honest—performance reviews
  • Provide warnings, implement performance improvement plans, and thoroughly document the entire process
  • Have all terminations reviewed by
    • a manager from another department and
    • outside legal counsel
  • Terminations should never come as a surprise to the employee!

Moral Hazard Issues

A broad reading of EPLI wage and hour exclusions is consistent with the moral-hazard doctrine, which seeks to avoid coverage when insureds could knowingly precipitate the event insured against.

"Insurance against a violation of an overtime law, whether federal or state, would enable the employer to refuse to pay overtime and then invoke coverage so that the cost of the overtime would come to rest on to the insurance company."


However, given the lack of indemnity coverage under defense-only wage and hour coverage arrangements and the high SIRs (minimum $250K) under stand-alone wage and hour policies, the moral hazard is somewhat reduced (although not eliminated) since insureds still bear a significant portion of the financial risk.
Concealment of Potential Claims: A Common EPLI Moral Hazard Issue

- EPLI applications
  - Applicant/insured must list *all* incidents of which it is aware that could potentially give rise to a future claim
- Coverage excluded
  - If any incidents listed in the application later give rise to a claim during the succeeding policy period
- Insurer coverage denials
  - Insurers often assert that the insured/applicant knew of the impending claim and purchased EPLI to cover it
- Avoiding coverage denials
  - Notify *current* insurer of all incidents to “lock in” coverage under policy’s “discovery provision” (see next slide)

Discovery Provisions: An Example

Policy Period: 1/1/17–18
Notice of “Incident” Reported to Insurer: 7/1/17
Claim (Arising from the “Incident”) Made Against Insured: 1/1/22

---------X----------X----------X-------------------------------X------
1/1/17     7/1/17     1/1/18               1/1/22

- If the “incident” is reported to the insurer *during* the policy period, coverage will apply to *any* subsequent claim, regardless of how far in the future the claim is actually made against the insured!
“Loss” and “Damage” Triggers: Reporting Issues

• Generally, insureds must report “claims” to the insurer “as soon as practicable” (i.e., as soon as management becomes aware of the claim).
• Chubb wording: but no later than 90 days following policy expiration (if policy is not renewed)
• Chubb wording: but no later than 180 days following policy expiration (if policy is renewed)
• These time frames vary slightly by insurer (e.g., 60 days, 120 days, etc.)
• **Key Point:** EPL policies are written on a claims-made and reported basis, so claims must be reported to the insurer within a restricted time frame for coverage to apply—unlike occurrence policies.

“Loss” and “Damage” Triggers: Reporting Issues (cont’d)

• Don’t delay
  • It is rarely wise to delay reporting a claim
• It gets worse
  • Claim exposures only increase over time
• Let the insurer handle it
  • The sooner you report it, the sooner the insurer’s claim-handling expertise will be brought to bear
• Report claims to your agent/broker
  • After you do so, request a copy of the letter your agent/broker sent to the insurance company
• Delayed claim reporting is an all-too-frequent cause of claim disputes and coverage denials—headaches you do not need!
Author James Baldwin on EPL Claim Reporting

“Not everything that is faced can be changed, but nothing can be changed until it is faced.”

It is rarely a good idea to delay reporting an EPL claim!

Lawsuits

• When considering coverages, consider what a lawsuit in the agricultural world looks like....
  • Agricultural Workers Protection Act claims
  • Wage and hour claims
  • ADA claims
  • ADEA claims
  • FMLA claims
  • Religious/gender/national origin/racial discrimination
  • Retaliation, including workers compensation retaliation
  • Attorneys’ fees and costs
Lawsuits (cont’d)

Let’s have you apply your newly acquired knowledge to some scenarios.
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