The Anatomy of an EPLI Claim – From Start to Finish

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Your Presenters

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The Setting ….

- Lawsuit against Manny’s Restaurant, Inc., dba “Cup of Joe,” one of 3 restaurants operating under Manny, Moe & Jack’s Restaurant Group, Inc.

- Lawsuit alleges meal and rest break violations, with former 17 year old server also alleging that she was sexually harassed by Cup of Joe’s owner and General Manager, Manny. She also maintains that she was harassed by “maître D” Hugo. She complained to Moe, and was wrongfully terminated.

- Lawsuit was filed October 1, 2019; DFEH Complaint filed on October 2, 2018 (which the Insured maintains it never received). PAGA letter is threatened for the meal and rest break issues, which would include the two other (non-insured) restaurants.

- A new account to Preferred Insurance Company, who began the underwriting process in December 2018, with the Policy finalized in January 2019. Policy is $500,000, excess a $10,000 retention.
Receipt of Claim and Initial Check Points

• Claims Made and Reported Policy
  – Date of Claim
    • DFEH Complaint – What do you need to know before making that decision
    • Lawsuit
  – Number of Claims/Retentions
    • Are the Wage and Hour and Harassment/Termination Claims “Interrelated”
    • Does it matter if this becomes a PAGA Claim, so there are other interested “parties” (i.e., the State of California)?

• Impact of threatened claim (“circumstance”) against the other two restaurants

• Trigger of Underwriting Review
**New Account**

- **Standard Applications**
  - Disclose “claims” within the prior 3-5 years
  - Disclose any identified potential “claims” or adverse circumstances (defined? understood?)
  - Representations on training – California; mandatory sexual harassment training
  - Representations on meal and rest break policies
  - Representations on the number of employees/turnover
  - Representations on consultation with counsel before terminations

**New Strategy by Plaintiff’s Attorneys** – get the policy and application to find inconsistencies and representations on actions later not taken by employer!
Assignment to Defense Counsel

• Appointing the Right Firm (Attorney)
  Personalities; Gender/Race; Location; Type of Case

• Deciding whether you have a “Cumis” Situation?
  – Relates to a “reservation of rights” where the outcome of coverage relates to conduct to be litigated in the lawsuit, with the outcome potentially controlled or impacted by defense counsel, creating potentially divided loyalties.
  – Accept/Deny vs. “Reservations of Rights”

• Managing Counsel Successfully/Ensuring Counsel timely and fully communicates with all concerned
The Defense and Early Mediation

- Early Investigation
  - Really Need to Know the Facts/Size up the Insureds and Key Witnesses
  - Must Know the Documents/Get the Documents

- Early Mediation
  - Depends (on facts, and geographic area of the State!)
  - Depends on who you can agree on for your mediator
  - Depends on whether you “know” your case

- Discovery – Do you really “need” it; do you just “want” it; would it just drive up costs and make settlement more difficult
Discovery and Claim Management

• The “Right” Discovery Plan

• The “Right” Law and Motion Approach

• The “Right” Experts
  – The “Need” to Potentially Update/Revisit/Remind on Coverage Issues

• The “Right” Counsel and Advice
MSC/Mediation

- The Actual or Threatened Existence of Expanding to New Entities
- Strategies for dealing with PAGA Settlements
- Global – Individual Claim
- Keeping Egos and Emotions in Check (for all concerned)
- Roles of Claim Representative/Counsel vs. Defense Counsel
- Personal Exposures vs. Covered Exposures (Ins. Code Section 533 v. Covered Claims; Getting the Separate Insured-Insurer Settlement Agreement)
Trial

• Witnesses and Preparation

• The “Right” Jury Instructions and Special Verdict Form

• Careful Attention to Objections/Protecting the Record

• Verdict/Judgment/Coverage
Questions
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PLUS Presentation Outline

EPLI Claims: Inception to Conclusion – What Underwriters and Claims Professionals Need to Know Going into 2020

Seminar Date: November 21, 2019 from 5:00 p.m. to 6:30 p.m.

Panel: Rob Cutbirth (Coverage Counsel), Allan Gomes (Defense Counsel), TBD (Broker Representative); TBD (Mediator)

I. Introduction (10 minutes)
   Brief overview detailing the scope of the presentation discussing short fact pattern regarding potential employee issue and potential inclusion in coverage under EPLI policy.

II. Role of Broker in Acquiring EPLI Coverage (10 minutes)
   a. Discussion of covered and uncovered claims, limitations on policy, and effects of deductible on purchase of policy
   b. Broker’s role during lifetime of matter

III. Potential Varying Origin of the Claim and Strategies for Addressing Claim (20 minutes)
   a. Address potential scenarios dependent upon various origination of potential claim
      i. Initial complaint by employee to employer without employee being represented
      ii. Request for Employee’s personnel file and wage records
      iii. Demand letter from Plaintiff’s counsel regarding claims
      iv. Lawsuit Filed
   b. Exploration of Potential Paths for Handling
      i. Presence of arbitration clause
      ii. Early evaluation of claims and attempts at informal resolution

IV. Litigation/Arbitration (20 minutes)
   a. Costs associated with depositions/discovery
      i. Informal v. formal discovery
      ii. Costs/benefits of discovery motion practice
   b. Potential for dispositive motions

V. Mediation (15 minutes)
   a. Early exploration of mediation as a path for resolution – one size does not fit all
   b. Informal settlement negotiations with opposing counsel

VI. Trial (10 minutes)
   a. Mandatory settlement conferences
   b. Costs of trial and risks
   c. Exposure to attorneys’ fees as a settlement factor

VII. Post-Trial Exposure (5 minutes)
   a. Balancing of risks and costs related to appeals
EPLI Claims provide a challenging and ever-shifting landscape for underwriters, claims professionals, and defense and coverage counsel, particularly given recent changes in strategies by Plaintiffs’ counsel. This program will go through the lifecycle of two types of Employment Claims (Wage and Hour, including retaliation; and Sexual Harassment and “wrongful termination”), and the circumstances leading up to those claims, to identify how all involved in the insurance process can better understand their roles, responsibilities and rights in a real world setting in order to best protect their common interests.