

The Employment Law Counselor hosted by Jeff Stewart Episode 8

PLUS Staff: [00:00:00] Welcome to this PLUS podcast, the Employment Law Counselor hosted by Jeff Stewart. Before we get started, we'd like to remind everyone that the information and opinions expressed by our speakers today are their own, and do not necessarily represent the views of their employers, or of PLUS. The contents of these materials may not be relied upon as legal advice.

Jeff Stewart: Hello everyone and welcome to the Employment Law Counselor podcast. I'm your host Jeff Stewart, and today we'll be looking at the underwriting process for EPLI policies. This podcast is a collaboration between White and Williams LLP and Professional Liability Underwriting Society, commonly referred to as PLUS.

Usually, I'm joined by one of my colleagues here at White and Williams, but today I thought it made more sense to reach out to one of my friends within the insurance industry to get his perspective on our topic. So today, I'm joined by Chris Williams from Travelers. How are you doing today, Chris?

Chris Williams: Doing great, Jeff. How are you?

Jeff Stewart: I'm doing well. I'm so thankful you could join us.

Chris Williams: Thanks for having me.

Jeff Stewart: Absolutely. Chris, before [00:01:00] we jump into our topic, why don't you give us a little bit of your background and experience in the insurance industry?

I started my insurance career in the mid-nineties after applying to an ad in the Hartford Current, which makes me feel very old indeed.

I started my career as a property adjuster, then transitioned to handling EPL and management liability claims. And I think probably 10, 12 years ago, I transitioned over to the underwriting side.

Jeff Stewart: And what is your position currently?

Chris Williams: So, I'm currently the EPL product manager at Travelers. And in that capacity, I'm responsible for our underwriting strategy, helping underwriters profitably grow their book, identifying trends, helping out on risk management, content, and policy language.

Jeff Stewart: Great. So, before we get into the meat of our discussion, I always have to give the general disclaimer that this is not legal advice. This podcast is designed not to be a comprehensive view of the subject, and it may not apply [00:02:00] to your particular facts or circumstances, and listeners should consult with their own attorney or other professional advisor if they need to.

So, with that, let's jump into today's topic, which is how insurers underwrite EPL policies. So, before I get to that, let's just start with a very basic question. What is underwriting?

Chris Williams: It's essentially a process for an insurance company to evaluate a risk and determine whether they want to take on that risk.

And if so, at what terms, and those terms could include sort of the limit, the deductible or retention, policy language, price, whether to offer coverage enhancements or put exclusions on the policy.

Jeff Stewart: So, in other words, because insurance isn't a one size fits all product, this is essentially figuring out what size makes sense and then how much it should cost at that size?

Chris Williams: That's a really good way of looking at it, Jeff. [00:03:00]

Jeff Stewart: Why, thank you.

Chris Williams: You could come work in the insurance industry, maybe sometime.

Jeff Stewart: So, when I go and get insurance and, you know, could be for my car, it could be whatever, I'm always asked a bunch of questions and then I just get a number and no one has any idea how that number is actually created. It's the underwriters who come up with that cost?

Chris Williams: It is the underwriters that come up with the cost, but they are subject to restrictions. So, we have a filed rate plan in most states, and that filed rate plan basically sets forth what price we're going to charge. The underwriters do have some discretion based on their evaluation of the risk.

It's always interesting where the information comes from. In the EPL context, we usually get an application from our customers. I recently applied for an auto and homeowners and umbrella policy, and I was sort of surprised how much data is out there. They seem to know more about me than I knew about me.

Jeff Stewart: It is an interesting world we live [00:04:00] in today where data controls all it seems. So, when you are beginning the underwriting process, first off, is the process the same for all different kinds of insurance?

Chris Williams: I think it can vary considerably because, as I mentioned, other lines, there may be more publicly available information.

In the employment arena, there just isn't that much information with specifics about some things we would want, employee count, how many employees are located in specific locations and such. Like a fiduciary liability policy. Companies have to file a Form 5500, and that provides a lot of information. So, the company, insurance company, may be able to obtain that information from that Form 5500.

Jeff Stewart: Okay, now in the EPLI context, what information do you specifically look for from an employer as you go through this underwriting process?

Chris Williams: So, there's a bunch of things we look at. And the first thing is how many [00:05:00] employees the organization has. I suspect you've probably seen this in your context as an employment lawyer. Companies with more employees probably get claims more frequently.

Jeff Stewart: Absolutely.

Chris Williams: So, there's essentially more risk there. So, we would look at how many employees they have, and then we break that down between the full time and part time. One of the big drivers, and I feel like I'm telling you everything you know already, Jeff, but is a lost wage claim and a part-time employee generally makes a lot less than a full-time employee.

So, there's a different premium generally associated for most carriers with a full-time employee and part-time employee.

Jeff Stewart: Do you look at, you know, you mentioned pay and, you know, back pay is obviously a huge part of any kind of a claim. Do you look at the

salary levels for example companies that pay their people a lot, do they end up with higher premiums based on that?

Chris Williams: So, at [00:06:00] travelers, we don't specifically look at the compensation levels. I know some carriers do. The reason we don't ask for it is because you can generally gauge what the salary levels are going to be based on the industry classification. So, for example, if you are a hedge fund, everybody makes a lot of money compared to somebody working or running a fast food restaurant, which would be close to minimum wage.

So, you can make some assumptions about that, what your loss content will be relative to the industry that they're operating in.

Jeff Stewart: Does it also vary a good bit with where the client is located?

Chris Williams: It certainly does. So, I don't know if you've had the good fortune to practice in Southern California, but an organization with employees in California presents a much higher risk than somebody elsewhere in the country and there's some other hot pockets throughout the country where it be the risk is significantly elevated.

So, for that reason we ask how many employees do you have in California?
[00:07:00] We also ask how many employees do you have in Illinois, because we want to know if there's biometric exposure that we need to be concerned about. And finally, I would just say we look at foreign employees also, because generally there's a lot less exposure for a foreign employee relative to a U.S. employee.

Jeff Stewart: And, you know, you mentioned certain industries, you kind of get a feel for, you know, hedge funds that are very highly compensated, fast food is lower. Are there any industries you just stay away from? Say, look, we, we just want to, we, that, that's not an area where we want to be, there's too much risk?

Chris Williams: So, there are some industries like that. So, for example, adult themed restaurants like a Hooters or something like that. Adult entertainment overall. Anything involved in the manufacturing, distribution, or sale of marijuana products because it's illegal at the federal level. And I suspect most carriers have a different appetite of things they'll write and things they won't write.

Jeff Stewart: Okay and what about claim history? I mean, you know, we are, we're [00:08:00] always taught the past will generally tell us what's going to

happen looking forward. But how much do you look at past claim history for an applicant?

Chris Williams: So, we look at it pretty closely. We look at one, the frequency of claims, how many they've had relative to their, their sizes and from an employee standpoint, we look at the severity of those claims.

And if it is a severe situation, what has the employer done to rectify the situation? Have they made some changes in their policies? What happened to the alleged wrongdoer is he or she still within the organization? I don't know if you've had any of those claims, Jeff, where you've had to represent the president of the company that's been accused of some inappropriate behavior, but from an insurance standpoint, that's a really challenging risk to write going forward.

Jeff Stewart: Absolutely. I can certainly understand that. And I have been in a number of cases where you know, a top executive is also accused of wrongdoing and it's, [00:09:00] it does make for an interesting and complicated case.

So, what other, I mean, we've talked about some of the, I'll call them the obvious factors. How many employees, where are you, what's your industry, how much are they paid?

What other types of things do you look at or look for in the underwriting process that maybe aren't so obvious?

Chris Williams: So, the number of independent contractors, because that can lead to some misclassification issues and they can sometimes attempt to bring claims under employment statutes. We look at the number of fired employees, probably not surprisingly, most of our claims come from people that are fired from an organization.

I don't know if you've had a similar experience, that's where most of the litigation that you handle is involved.

Jeff Stewart: Absolutely.

Chris Williams: We look at the number of layoffs and if there's anticipated layoffs. We look at HR policies. We ask, have you consulted with employment council before you terminate somebody? I'm sort of curious about your thoughts about [00:10:00] that.

I mean, how often do clients come to you, Jeff, and say, “well, we're thinking of terminating somebody.” And you tell them, “you know what? You might just want to put the brakes on this for a moment.”

Jeff Stewart: Yeah, that's an interesting question because that actually is a significant amount of my practice, the consulting piece.

And I always am of the opinion and of the philosophy that it is much better for everyone involved to avoid the lawsuit altogether. Okay. And that may involve, “you know what, we don't have everything we need.” Or “let's review all of the documentation to make sure if there is a claim that we can defend that very clearly, right off the bat.” And sometimes it involves, “you know what, this is a questionable case, maybe we want to offer severance and in exchange for a release to avoid any potential claim.” Because you know, there is some question there, but the employment relationship is broken [00:11:00] and the employer wants to separate, needs to separate, but is willing to, you know, pay some severance in exchange for a release.

Chris Williams: I think there's such value in that when companies do talk to their lawyers about terminating somebody just beforehand, because that process can be so long and tedious, right? It can take a couple years to litigate an employment case. And no one ever goes through that process and says boy I'd like to do that again because it was a lot of fun. As pleasant as you are, Jeff.

Jeff Stewart: Yes, I have many people say, “Jeff, I've loved dealing with you, but I hope I don't have to talk to you anytime soon.”

Chris Williams: In some accounts we look at financials, just going back to the claim issue. If they've had a claim, we always try to solicit feedback from our claim department as well. And that is always a concern if you get real negative feedback from the claim department.

Jeff Stewart: Are there any red flags that you look for, like, “oh boy, if we see this, we know we've got a problem.” Or you know, [00:12:00] something to that effect?

Chris Williams: I'd say significant prior losses, especially high severity losses, and especially those that didn't result in any change in the organization. If there isn't a good story to tell about what happened and what they did to rectify the situation.

Another red flag is claim feedback. If the claim person comes back and says, I just got sworn at on the phone, the insurer was very difficult to work with, non-responsive, that makes it a challenge for us to have a real partnership in resolving the claim. Significant layoffs can be another red flag.

I'd say not necessarily a red flag, but presence in California is, is more challenging for us and just industries with high wage earners as well.

Jeff Stewart: So now we've talked about you gather all of this information, there's all this data, lots of different things. And then somehow, I don't know if it's, you know, a secret formula, if there's a slide rule involved, how do you come up with what, what exactly the rate [00:13:00] should be based on all of these factors we've talked about here today.

Chris Williams: So, it's triple secret Jeff, but so the actuaries at most insurance companies created a rate plan, which has been filed in most states. And that's basically a formula for it spits out a premium after you enter those relevant factors. And then the underwriter has some discretion, right? They may think, well, this is a company with phenomenal management. They've done a lot on the DEI initiatives. They have a great HR department. They got a great track record in sort of nipping issues in the bud. So, this is a more attractive risk or maybe it's a less attractive risk. So, the underwriter does have some discretion in most states.

Jeff Stewart: And then from there, I'm assuming the perspective insured either takes it or goes somewhere else. Do you do an annual "let's take a look, does this make sense? Do we reassess?" Do you reassess every couple of years? How [00:14:00] exactly does that process work?

Chris Williams: So, depending on the size of the account we might look at it every third year, once for a risk, we look at on an annual basis, some customers prefer a multi-year policy.

And it, it sort of depends one on the size of the risk and the type of the risk and what their loss experience is, whether we're willing to offer them a multi-year policy or not. And generally, then we'd, we'd present the terms to an agent and the agent would then present those, those terms to the client.

Jeff Stewart: Well, thanks Chris for kind of pulling back the curtain a little bit on the underwriting process. This has been very educational. And speaking of education, I know, Chris, that you are also one of four co-chairs for the

upcoming PLUS EPLI Symposium in New York City. What can people expect at that event?

Chris Williams: So, we have three sessions planned for the day. The first one is “The Sky is Falling,” which sounds a little intimidating. “Going Inside the Jury Room to Defuse Nuclear [00:15:00] Verdicts.” The second one is “DE&I Under Attack: How Should Underwriters Assess the Risk?” And the third one is a “Lightning Round: What Should We Be Worried About Next?”

Jeff Stewart: And is there one in particular you're looking forward to?

Chris Williams: I'm going to cop out and not answer that question. And let me tell you why, Jeff, I'm sort of interested in all three. The first one on the nuclear verdict panel, they have a jury consultant, which I'm really intrigued to hear from.

Jeff Stewart: And I think that topic is absolutely timely and I am looking forward to that one more than any, I'll choose, that's the one I'm looking forward to more than any.

Chris Williams: Okay, that's fine. You can pick, because we just never quite know from where I'm sitting what's going on in that jury room. I remember we hired a mock jury once and within five minutes the mock jury was in front of the glass screen, he couldn't see me, I could see him. He fell asleep and I thought, well, this is not a great sign, right, how this is going to go.

From an EPL perspective, the DEI [00:16:00] initiatives, um, are seen as a plus, right? But any organization that seeks to be more inclusive workplace, you think they'd have less EPL claims, but there have been some lawsuits over some DEI initiatives, so I think that's sort of a, an upcoming issue that's going to be interesting.

And just the Lightning Round. I don't know about you, Jeff, but I didn't predict the huge surge in sexual harassment claims, biometric claims, or COVID claims like two months before those things happened. So, it's really difficult to predict what's going to happen. So, I'm always sort of intrigued where the EPL world is headed and what folks are thinking.

Jeff Stewart: It definitely is difficult to predict. I'm always curious to see what, what other people are expecting. Cause you know, I get asked all the time, “Hey, what should we be looking out for? What's on the horizon?” And you

know, I could literally tell them 20 different things, but who knows what actually will be that next big thing.

Chris Williams: I'm totally with you on that.

Jeff Stewart: So the event is scheduled for Monday, March 4th in New [00:17:00] York City. How many people are you expecting?

Chris Williams: Somewhere between 350 and 400 people. It's going to be great, that's all I can tell you.

Jeff Stewart: I know I went to it last year, the inaugural one, and it was very well attended and a very good program.

How can people learn more about the event?

Chris Williams: So, if you go on the plusweb.org website and you search under list of events, it's right there and you can register right there. It's pretty simple.

Jeff Stewart: Okay, I know I will be there, I know you will be there, and I'm sure many others will.

Chris Williams: I'm looking forward to seeing you there.

Jeff Stewart: All right. Well, thank you, Chris, for joining us. And thanks to all of our listeners for joining us here on the Employment Law Counselor podcast, where we try to make sense of the world of labor and employment law, or in this case, EPLI insurance. On behalf of myself and Chris Williams, we thank you for listening.

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