

The Employment Law Counselor

hosted by Jeff Stewart Episode 9

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. If this is the first time you've found us, welcome. If you've listened before, welcome back. Today we'll be looking at the state of the EPLI market from the broker's perspective. This podcast is a collaboration between White & Williams, LLP and the Professional Liability Underwriting Society, commonly referred to as PLUS.

Usually, I'm joined by one of my colleagues here at White & 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 the topic. So today I'm joined by Tom Hams from Aon. How are you doing today, Tom?

Tom Hams: I'm great, Jeff. How are you?[00:01:00]

Jeff Stewart: I'm doing well. Can you tell our listeners a little bit about you and what it is you do within the EPLI world?

Tom Hams: Sure. So, I am an attorney by background, always like to say reformed attorney, right? You know, but I--my role with an Aon is to run the in-plan practices, liability, brokering practice for Aon U.S., but because of the nature of, you know, the practice being so U.S. focused, the exposure being U.S. focused, I often get dragged in across the globe. So, I get all sorts of fun opportunities to help clients and fellow brokers.

Jeff Stewart: And you've been doing this for quite some time. I mean, you're one of the OGs in the EPLI world, wouldn't you say?

Tom Hams: Sad, but true. Longevity helps, but doing about 25 years now.

Jeff Stewart: Great. So, your experience is exactly why I decided to tap into you for today's episode. So, before we get started, just our normal general [00:02:00] disclaimer that the material here is for general informational purposes only and is not legal advice.

It's not designed to be comprehensive, and it may not apply to your particular facts or circumstances. So, consult as needed with your own attorney or other professional advisor.

So, Tom, you and I started talking about kind of the state of the EPLI market, and what do you see, or what have you been seeing as the hot areas in that space right now?

Tom Hams: Yeah, it's always interesting in EPL the marketplace because it's always evolving just like the exposure is evolving. And I think that's one of the unique factors about it is you just what the latest trend is, right? There's always a trend. Right now, it's interesting because it's traditionally been the Bermuda marketplace, which writes larger employers, higher attachment points.

They've always done pretty well because they don't have frequency of severity. And the domestic market has been more severity oriented. And the U.S. marketplace has been traditionally [00:03:00] more small employer to mid-market employer oriented. So, they get more frequency, but less severity.

Traditionally, the Bermuda market's done better, Lately, they're getting pounded because of what you and I have talked a lot about, which is nuclear verdicts. They would tend to see more frequency of severity out of these nuclear verdicts, and that's not part of what their model is designed for. So, that's been the interesting trend to watch.

Jeff Stewart: And I will, I do want to talk about nuclear verdicts a bit. So, I guess for purposes of our discussion, how do you define a nuclear verdict?

Tom Hams: I define a nuclear verdict as something above a million dollars, I would say, because traditional retentions beyond that point would be typically expect to be out of the frequency game.

So, above a million dollars is how I define that.

Jeff Stewart: And I know employment lawyers like myself and obviously like yourself, we keep tabs on these things. And we know that over the last, really, 4

or 5 [00:04:00] years, we have seen an explosion in these what we call nuclear verdicts, and that has had a real impact on all claims.

Would you agree with that?

Tom Hams: Absolutely. It's changed the way people defend claims as I'm sure you would agree. Just because they typically, they would try to look for quick outs to get rid of cases, and I think that the frequency and high profile of these nuclear verdicts has made the plaintiff's bar very aggressive and made it very hard to get rid of these claims quickly.

Jeff Stewart: Yeah, and, you know, you and I were talking before we recorded today. I think these types of verdicts have very much emboldened plaintiff's attorneys on all fronts. And in this employment world, I had, for example, a case not too long ago where the initial demand letter basically cited recent verdicts of over 100 million dollars in [00:05:00] punitive damages, etc, etc, etc.

And my client looked at this and said, "Well, our whole company is not worth anywhere close to that." And I don't know what they're thinking, there's no way this would ever happen, but that doesn't stop them from throwing that out there to kind of try to scare a defendant into a settlement.

Tom Hams: Absolutely. I think that part of it is that, especially with some of the high-profile law firms, their war chest is full, right? So, if they miss on one, they miss on five, they're okay, as long as they hit that big one down the line so that they can just really take any type of claim and expect large dollars for it.

And if they don't get it, their plaintiff maybe suffers, but they're doing just fine. Thank you.

Jeff Stewart: And what have you seen your clients doing to try and avoid? Being the next high-profile case?

Tom Hams: What makes me enjoy my [00:06:00] work is I work with our clients and with their subject matter experts to really understand and tell a good story about how they work to try to make small things not turn into big things. How to resolve them quickly, how to have the right policies, how to have the right, you know, sort of initiatives to be a good employer of choice. And again, if you, you know, you have that kind of positive environment, you hope that that helps prevent these sort of great stories for the jury to hear. But at the end of the day, the plaintiff's bar can weave a story, true or not, that attracts the

jury's attention. All that kind of good effort and good faith, this is kind of taken off the board.

Jeff Stewart: And, you know, I have always counseled my clients that one of the best things to do is avoid the claim altogether. You know, if you can take some action to do something to prevent an employee or an ex-employee from bringing that claim against you, then you have no chance of having [00:07:00] one of those nuclear verdicts, etc.

And I've seen more clients willing to offer severance when there's a separation, obviously in exchange for a complete and general release, in order to avoid any chance of this happening. Have you also seen that increasing?

Tom Hams: Absolutely. Yes, it's money well spent. It, you know, it certainly is an area that we see clients use more and more often.

And certainly, you worry about reductions in force and whatnot, where there's less ability to sort of be as generous and certainly, we head into an economic environment where that could be more common. But at the end of the day, it's really money well spent. So, we've definitely seen clients use that more often.

Jeff Stewart: Absolutely. So, aside from these nuclear verdicts that have really impacted a whole lot of the EPLI market, what other areas do you really see as hot button right [00:08:00] now?

Tom Hams: Yeah, so, probably no surprises for anybody that's been paying attention. Certainly, DE&I, diversity, equity, inclusion initiatives, and sort of the attack on those initiatives, as far as reverse discrimination is certainly an area of hot topic.

We've seen a lot of activist law firms out there writing letters, if not actually bringing actions, trying to attack those as quotas. So that's one big area. Obviously related to the Supreme Court activity that sort of gave a sort of guidance on how to bring those claims for future reference.

Artificial intelligence, certainly a hot topic that we haven't necessarily seen that generate into claims activity, pay transparency. certainly a hot topic. Those are the ones that kind of immediately come to mind.

Jeff Stewart: Now, interesting when you say there's these hot topics. You know, you mentioned nuclear verdicts, you mentioned DEI, and some other developing areas of law.

These happen to be three topics at [00:09:00] the upcoming PLUS EPLI Symposium. Now, Tom, a little birdie told me that you were one of the people who put this whole thing together. Is that a coincidence that that's what we're talking about as the hot areas now? And that's what is going to be spoken about at the Symposium?

Tom Hams: Absolutely. Not only are they hot topics, and that's what led to these being selected, but that's what we really think people, underwriters want to hear about, which is a good chunk of the audience that we're focused on.

Jeff Stewart: Well, let's talk briefly about the Symposium.

First off, last year was the first PLUS EPLI Symposium in several years, and I attended. I think you did as well. And it was frankly very well attended and very successful. What are you expecting for this year?

Tom Hams: Yeah, I really expect it only to grow from there. We [00:10:00] had a, you know, full room--I think it was close to 300 people.

We were thrilled with the turnout, and it really reflected sort of the hunger for this type of content from such a kind of respected source. Right? There's lots of conferences out there, but this is a particularly good one. We had a great set of speakers. We hope that that set of speakers this year is as equally expert, and we think they are, and kind of added broader topics, but kind of touching on more and more platforms, if you will, as far as where the need is coming from. And really excited about the chance to continue this. We even hope to expand the amount of time we have in future years, hoping that again, this year is another success.

Jeff Stewart: Absolutely. And I'm looking forward to it. And can you tell our listeners when and where it is if they don't already know?

Tom Hams: So, I'm going to pause here because I got my script all set. So, that's a [00:11:00] great question. The conference this year is on March 4th and it's in New York City as usual at the Marriott Marquis.

So, a great location. And so again, we're looking very much forward to having folks come out for it.

Jeff Stewart: Absolutely. And is there a session that you are particularly interested in learning about and hearing what our speakers have to say?

Tom Hams: So, my interest one is the DEI session. Again, it's an area where employers have worked so hard to be employers of choice and sort of be good corporate citizens, if you will.

And now, it's an area where it puts a target on their back, practically. So, I'm really interested to see the panels discussion on what, from an underwriting perspective, they expect clients to be doing in that area now that there's sort of a, somewhat of a backlash on those initiatives.

At the same time, they also view them from an underwriting perspective as being a good thing. How are clients responding to that? [00:12:00] What would they like to hear that clients are doing in that area?

Jeff Stewart: Well, without giving up too much of the content of the Symposium, what are you seeing your clients doing to address some of these DEI attacks, for lack of a better term?

Tom Hams: Yeah, so I think that they're again, best course of action, as always, and you'll appreciate this suggestion, but, you know, working with outside counsel, right? To make sure that they're kind of scrubbing their initiatives all over again.

Jeff Stewart: I do appreciate that answer. Working with outside counsel is always a good thing.

Tom Hams: Exactly. It's a good plug, but it's good practice, more importantly. And it's sort of, it helps them to look at it now with a new lens right now. Now, in the current state of being, how are those initiatives stacking up? And again, I think most employers feel pretty comfortable about what they've done in the past.

I mean, again, the rub is, you know, these are quotas, et cetera. And most employers have long since known that they can't have quotas and [00:13:00] that they shouldn't look or feel like quotas, but again, you can always look at it from a different angle and suddenly realize, "hey, maybe this was something that's pushing too close to the line."

And we can be better at this in the new environment.

Jeff Stewart: Absolutely. And when I looked at the agenda for the Symposium, the one that I obviously looked very closely at was the nuclear verdicts, which

we talked a little bit about. But the thing I found interesting when we were talking about this is that panel is going to have a jury consultant as part of it.

How did that come about?

Tom Hams: Yeah, so it was kind of a very organic, we were talking about topics, and I thought that would be cool. And what was neat about it was that I had thrown that idea of, you know, maybe we could get something like that, a person like that. And somebody else on the panel had recently worked with one and so an expert that had done a great job in a similar [00:14:00] setting.

And it was very, very exciting to sort of like everybody just sort of gravitate to that one. And I'm, I've never seen this person. So even though I am very interested in the content on DEI the side, I'm really interested to see what you can do here. Cause I almost, my only sort of, I almost feel like it's an unsolvable problem, right?

Just because you can't control the plaintiff's bar. But again, great content there about, you know, best practices and how to manage that process and hopefully get a much better result. Looking forward to it.

Jeff Stewart: And then the, the other session is kind of, it sounds scary; What Should We Be Worried About Next?

As if we don't have enough things to worry about today, you want to talk about what we're going to worry about next. What kind of things do you expect to be addressed there?

Tom Hams: Yeah, and so, you know, the reality is, is that we talk about all these kind of newfangled things like AI, but that's not necessarily generating claims now.

Certainly, we expect them to in the [00:15:00] future. But we've got to remember that a lot of the claims still come from all the rogue areas, discrimination, you know, harassment, pregnancy discrimination, you know, age discrimination. So, they're going to be a lot of talk about that. What's the EEOC up to?

What's the NLRB, which has become more activist, what are they up to? But then some interesting areas that when I hadn't even really heard much about the Crown Act, which again, new area for me to learn about. And so, it's going to be

a lot of those topics. And, you know, again, BIPA and GIPA, you know, and so forth, all the alphabet soup of information protection act type situations.

So those will be certainly hot topics as well.

Jeff Stewart: Absolutely. And, you know, frankly, we could probably do two days of just EPLI topics. And frankly, I wouldn't get bored. But then again, this is what I do for a living. [00:16:00] But there are a lot of areas that really aren't going to be touched on in the Symposium.

But I wanted to kind of get a little feel from you. What are some other areas that you're seeing that are still, I'll say, a very large concern?

Tom Hams: Yeah. And the biggest one out there. And again, I think you'll appreciate this one is wage and hour issues, right? Certainly, jurisdictional California still leads the charge as being the biggest source of claims out there, but sort of across the country, wage and hour issues continue to be area of concern.

You know, everything from misclassification of exempt versus non-exempt to pay practices to misclassification of employee versus independent contractor. Our clients are facing those issues every day and there's a robust source of coverage out there that even after about 10 years of being available, not a lot of folks know much about, so.

Jeff Stewart: I was actually going to ask you about that because a lot of employers [00:17:00] think, "oh, well I can't really be covered for wage and hour issues or wage and hour violations."

Can you kind of explain some of the coverages that are available?

Tom Hams: Sure. I mean, in the U.S. marketplace, there's, there's always been some segment of the market that offers defense costs only, but often that's a small sublimit. It could be 100,000, could be 50,000. It's sort of focused more on small employers, but the true wage and hour marketplace, we work, we write with the Bermuda marketplace, and you can get upwards of 200 million dollars in coverage there for true kind of expansive coverage for defense costs, plaintiff's fees, you know, the back pay components that come with wage and hour claims.

Even to some degree, things like, you know, back taxes and things like that for situations where you thought that was person was an independent contractor and

we're paying taxes for them and surprise. They're now an employee and you have to catch up on those things. So, it's very broad coverage and again, [00:18:00] a lot of capacity out there.

Jeff Stewart: Yeah. And I shared with you that I have been working on a number of class action, wage and hour type cases. And, you know, even though a single violation may only be 100 dollars, 150 dollars, when you have 3,000 employees that you're dealing with, that adds up very quickly. And having the ability to have that insured is certainly something that I know a number of businesses would be very interested in and learning more about it.

Tom Hams: Yeah, absolutely. This, and as you can imagine, because of the severity of these claims, it is designed to be more catastrophic coverage. So, the retentions can be fairly high. But again, when you just talk about the defense costs alone in a class action, they add up quickly and it'll make that deductible look very small in comparison.

Jeff Stewart: Absolutely, because just the amount of time spent going through records and [00:19:00] searching for things is enormous. And especially if it is an employer that doesn't have a very sophisticated payroll system or timekeeping system, there's a lot of time spent in those areas.

Tom Hams: Yeah, the forensics alone will kill you from a budget standpoint.

Jeff Stewart: Absolutely. So, what do you see companies doing to kind of mitigate their risks in these areas? Do you see, have you seen a rise in, I'll say internal audits to make sure that they are complying with certain rules, et cetera.

Tom Hams: Internal and external. And again, lots of sources for that. Everything from, you know, Aon for instance, has equity and analysts that can do the quants stuff, which is a foreign to me as a lawyer.

I tried; I went to law school to get away from math. Right. But lots of sources for that definitely outside counsel, always a first stop for that. But as well as having beefed [00:20:00] up their internal resources to have those kind of functions there to audit practices and crunch the numbers.

Jeff Stewart: And many times, these wage and hour violations are based on state law, not federal law and state law is, I always tell people, always changing, you need to keep up with it. And in some cases, it may be even municipal law, you know, for example, New York City has several wage and hour ordinances

that need to be followed, etc. So, it's important to keep track of not only your state, but your municipality.

And if you're in many states, frankly, you need to keep up with all of them.

Tom Hams: Absolutely. And of course, don't forget about the federal government, because occasionally they like to stick their nose in there and certainly with things like exempt, not, excuse me, independent contractor and employee tests, so they've certainly gotten more active there as well.

Jeff Stewart: Yes, and we're actually only a [00:21:00] few months away from expected revisions to the FLSA regulations, which will change those salary levels for the white-collar exemptions. So that's something that I was telling a group this morning that they need to be keeping an eye out in 2024.

Tom Hams: It never, it never stops. That's what makes our jobs interesting, right?

Jeff Stewart: Absolutely. Anything else you'd like to add here in our EPLI discussion? That you're keeping an eye out on in 2024?

Tom Hams: Not that I can think of. You know, again, it's just the constant change, so we don't know what's coming around the corner next. But those are the ones that occurred to me, so.

Jeff Stewart: Well, Tom, I want to thank you for joining me here on the Employment Law Counselor podcast, where we try to make sense of the world of labor and employment law.

On behalf of myself and Tom Hams, we thank you for listening. If you enjoyed this episode, please leave us a five-star review, tell your friends and subscribe to the podcast. For more information [00:22:00] on this and many other topics, please visit the White & Williams website at www.whiteandwilliams.com, where you can visit our blog and learn more about the firm. Until next time, stay safe and stay compliant.

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