

BY RUSS BANHAM

In today's economy, the need for

Economic Downturn Fuels

FFP

A man in a white dress shirt and a patterned tie is carrying a large, stacked cardboard box. The box has orange and black decorative elements, including a black handle and a perforated strip. The background is a plain, light-colored wall.

employment practices liability coverage is on the rise.

Workforce downsizing and layoffs are generating a substantial uptick in age discrimination and other claims against employers—are your commercial clients covered?

Last year, according to the U.S. Equal Employment Opportunity Commission, a record 24,582 claims alleging age discrimination were filed against employers, representing a whopping 28.7% increase in age discrimination claims from the year before. Together with race, gender, national origin, disability and other discriminatory filings, total EPL claims increased 15% to 94,402 filings. “We’ve had an absolute sea change in EPL legislation and case law, and have seen rapid increases in the number of claims that will likely continue in the current economic environment,” says Lucy Ann Galioto, senior vice president of executive liability at AIU Holdings, a division of American International Group, Inc.

Yet, 63% of companies do not have employment practices liability insurance, according to a recent survey released by Chubb. And with EPL litigation expected to increase this year following several U.S. Supreme Court decisions widening employer liability and the President Barack Obama administration's pro-labor position, it's easier than ever for employees to bring discrimination claims—a scenario that could doom some smaller businesses. "Companies cannot afford not to buy the insurance," says Catherine Padalino, employment practices liability manager at Chubb Group of Insurance Companies.

Unemployment Drives up Claims

The biggest driver in claims activity appears to be unemployment. In March, 30,000 jobs were lost each workday, according to the Bureau of Labor Statistics, propelling unemployment to 8.5%, the highest rate in more than a quarter century. Since higher paid employees tend also to be older than the general employee population, firing them has an immediate financial impact on the bottom line, one that also hikes up the risk of an age discrimination claim. "Layoffs increase claim frequency and potential severity," Padalino says. "There is a direct link between unemployment statistics and employee claims of discrimination in their being laid off, especially when a worker is older."

She adds that employers that have never experienced a layoff situation are more likely to downsize in the coming year because of the protracted economic crisis. "Even small employers wanting to conserve expenses will look to trim the workforce," Padalino says. "The risk is that when people lose a job and can't easily find one—the situation we now have—they are more likely to file a lawsuit."

When they do, the costs are staggering. Chubb's survey estimates that the average total costs, including judgments, settlements, fines and legal fees of an EPL-related event are \$63,114. That's just the average—35% of survey respondents reported costs to their companies ranging from \$45,000 to \$600,000. Jury Verdict



Employers on the Hook for Retaliation Cases

In January, the Supreme Court issued another ruling effectively increasing employer liability in so-called retaliation cases—an employee who speaks out about discrimination during his or her employer's investigation into another employee's complaint of discrimination. In *Crawford v. Metropolitan Government of Nashville and Davidson County (Metro)*, the petitioner, Vicky Crawford, claimed that Metro fired her because she had reported, during the defendant employer's investigation of a sexual harassment complaint brought by a colleague, that the same subject of the investigation had also sexually harassed her. Crawford was subsequently fired. She later sued Metro alleging that the job termination was in retaliation for reporting the harassing behavior.

The Supreme Court ruled that Crawford's admission to Metro of being sexually harassed during the investigation was sufficient to gain protection from Title VII of the Civil Rights Act of 1964, which protects employees who speak out about discrimination from retaliatory acts. "Title VII retaliation claims were up 30.1% last year, according to the EEOC, and the new ruling indicates we may see continuing percentage increases in such claims against employers in future years," says Lucy Ann Galimoto, senior vice president of executive liability at AIU Holdings, a division of American International Group, Inc.

—R.B.

Research pegs median expenses much higher—\$200,000 for a median national jury award in 2006. The high costs make smaller companies particularly vulnerable to financial distress from an EPL claim, yet many fail to purchase insurance that would absorb much of the risk. "It's a dilemma that agents can help correct," Padalino says.

An Old Problem

Laying off a worker based on age has been illegal since 1967, following the passage of the Age Discrimination in Employment Act. The landmark legislation protects workers 40 years and older from employment discrimination based on age. Similar legislation also protects people from being fired because of their race, color, gender, religion, national origin and disabilities. Many of these laws have been strengthened by legislation or case law, with some lawsuits making their way to the U.S. Supreme Court for review.

Among them is *Smith v. City of Jackson, Mississippi*. The city had adopted a pay

plan that provided raises for police officers. Seniority played a role in the pay raises, with officers having less than five years seniority receiving a higher percent raise than those with more than five years of seniority. Officers older than age 40 sued, arguing that they were adversely impacted by the compensation plan based on their age. In 2005, the Supreme Court ruled in their favor, holding that employers are liable for establishing policies or practices that create a statistical imbalance adversely affecting protected classes of workers, regardless of their actual motivation or intent. "The ruling opened the door to 'disparate impact' claims under the federal Age Discrimination in Employment Act, making it much easier for employees to file a class action lawsuit," says Susan Volkert, an employment practices liability attorney and partner at Teaneck, N.J.-based law firm DeCotis, FitzPatrick, Cole & Wisler LLP. Disparate impact refers to a decision made by an employer that adversely affects a group of workers, in this case older employees.

Another case with EPL implications for employers is *Meacham v. Knolls Atomic Power*. Knolls, a private company that helps maintain the country's nuclear fleet, was informed by the U.S. Navy to reduce its workforce because less work would be available. The company offered voluntary retirement packages to several workers and subsequently reduced the workforce by 31 employees. Thirty of the 31 employees were older than 40 and 28 of them sued the company under the Age Discrimination and Employment Act, arguing that the downsizing disparately impacted older workers. Although Knolls claimed that reasonable factors, like employee performance, flexibility and critical skills had qualified the workers for termination, the Supreme Court in 2008 ruled that it would have to prove that these factors were, in fact, the rationale for termination.

"The ruling holds that the employer and not the employee bears the burden of proving that the employment action taken was based on 'reasonable factors other than age,'" Volker says. "Once an employee sues, it is very difficult for the employer to convince a court, on a motion for summary judgment, that the action should be dismissed. The Court thus made it exponentially more difficult for employers to obtain dismissal of disparate impact age discrimination claims on summary judgment."

Labor and Ledbetter

Many state courts have taken the Supreme Court's direction with respect to discrimination claims, widening employer liability and making it easier for employees to file claims. "In some states an employer with just a single employee can be held liable for discrimination, making small companies as vulnerable to an EPL claim as a much larger organization," Padalino says.

Legislation also has increased employer liabilities. In September 2007, President George W. Bush signed into law the Americans with Disabilities Amendments Act. The legislation rejects case law holding that mitigating measures, like medication, prosthetics and hearing aids, preclude a person from claiming a disability under the 1990 Americans with Disabilities Act. "The

new law expands who can claim a disability, thus increasing the possibility of a discrimination claim in the event a disabled person is laid off," says John O'Connor, vice president of product development and underwriting in the Select Accounts unit of Travelers. "We anticipate an uptick in such claims."

President Barack Obama's signing of the Lilly Ledbetter Fair Pay Act of 2009 further enlarges employer vulnerability to litigation. The legislation reversed an earlier Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, which held that an employee cannot assert discrimination in compensation if the employer's discriminatory compensation decision occurred more than 180 days before a claim was filed. The legislation effectively extends the time limit for employees to challenge compensation decisions on the basis of race, age, disability and other discriminatory factors to two years. The legislation is expected to spur an increase in costly pay discrimination claims. An employee could bring suit against his or her employer for discriminatory decisions made years ago if the employee's pay is still adversely affected by the results of the decision. Galimoto says the legislation is particularly important for women paid substantially less than their male co-workers. "It's just another instance of why EPL insurance is needed," she adds.

EPL Insurance Now

With mass layoffs and other reductions in workforces, Supreme Court rulings widening employer liability, federal legislation similarly opening the floodgates to discrimination claims and expectations of further pro-labor decisions in the years ahead, EPL insurance seems a no-brainer. Yet many companies, particularly smaller ones, fail to buy it.


Chubb has studied the reasons behind the malaise. "Our private company risk survey indicates that one in three companies don't buy the insurance because they perceive EPL to be either a low risk or not present any exposure, thinking erroneously that their workers compensation, general liability and umbrella policies already cover

the risk," Padalino says. "Obviously, the EEOC and other statistics argue these risks are real and rising."

Carriers sell EPL insurance as a standalone product or combined in a package with coverages for directors and offices liability, fiduciary liability, fidelity and crime and other employer risks. Financial limits of protection can be as low as \$25,000 to provide more attractively priced options to small businesses, although insurers contend at least \$100,000 in limits is warranted to truly shed the exposure. The EPL market is flat at the moment, after several years of softening, meaning the time is ripe for companies to buy. "Given rising unemployment, some of the recent laws that have been passed and the difficulties in finding a job after losing it, buyers may see a change in the (insurance) market," says Cara Lovering, Travelers vice president of EPL portfolio management.

Others agree. "The employee right now is in the driver's seat," says Brian Inselberg, president of the small business division at AIU Holdings. "Employer defenses have eroded, making it incumbent upon all employers to have their HR practices and procedures up to date. With changing laws and legislation, smaller companies have difficulty keeping up, making EPL insurance even more important." Inselberg points out that EPL insurance is more than just risk transfer. "Obviously the insurance covers legal costs and a settlement if there is one, but along with it are services like risk analysis and loss prevention at no additional charge," he says.

Travelers, for example, offers its EPL insureds a checklist to assess their exposure to an EPL claim. "Companies that lack full HR and legal staffs can't possibly keep up with changing laws and exposures," says Lovering. "We'll keep them up to date to ensure their EPL risks are managed carefully and consistently."

With no company immune to the protracted economic crisis, EPL insurance offers the peace of mind that a discrimination claim won't sink the ship. This alone seems to merit its purchase. 

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