

BOOK REVIEW

The EPL Book: A Practical Guide to Employment Practices Liability and Insurance, Kaplan, Andrew, et al., (Newport Beach, CA: Griffin Communications, Inc., 1997. 373 pp. \$125.00).

reviewed by Margo L. Buckles & Thomas J. Cole, Jr.†

From the courthouse to the White House, workplace harassment is in the news. As the result of 1991 amendments to the Civil Rights Act granting employees the right to jury trials and the ability to recover compensatory and punitive damages, employment litigation claims are on the rise. Employees, former and current, are taking their employers to court in record numbers.

In response to the explosion of employment litigation, employers began searching for ways to limit their liability. In the mid-1990s, many employers sought refuge in various forms of alternate dispute resolution, such as entering into contractual agreements with employees requiring employees to submit all employment-related claims to mandatory arbitration. The Equal Employment Opportunity Commission, as well as some courts, have taken the position that such agreements are invalid and should not be enforced. Because these alternative methods have fallen from favor, many employers have turned to employment practices liability insurance in an effort to shield themselves from potentially crippling jury verdicts. The authors' timing is excellent. They have presented a thorough and intelligent review of the area of employment practices liability insurance. In particular, they have set out an in-depth comparison of employment practices liability policies available currently on the market. For any employer considering the purchase of such insurance, *The EPL Book* provides a very useful education.

The book is divided into four parts, each dealing with an area of employment practices liability and risk management. In Part I, the authors give readers an overview of employment litigation risks by outlining

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federal employment laws, the burgeoning litigation surrounding employment harassment, and wrongful termination theories that give rise to lawsuits in the employment context. To illustrate the point that employment practices present significant litigation risks, the authors also provide charts designed to show readers that Equal Employment Opportunity claims of various types have increased in recent years and that jury verdicts, including punitive damages, can devastate the average employer.

Part II of *The EPL Book* focuses on developing internal risk management strategies. According to the authors, this should include written policies and procedures putting employees on notice of the employer's rules, investigation and intervention, and a general understanding of insurance businesses may already have purchased—many of which do not cover losses due to a company's employment practices. This overview of items employers should consider when implementing employment practices is written with the intended audience in mind: business owners and human resource professionals. It is not intended to be a treatise on labor and employment law. The book's legal discussion provides employers with the "nuts and bolts." However, although Part II provides excellent food for thought, following its advice will not necessarily eliminate all risk of employment practices liability. Recognizing this fact, the authors are quick to remind the readers that they should consult a labor and employment lawyer in their respective states when preparing employee handbooks or other substantive employment policies.

The authors also spend a few paragraphs in Part II discussing why job descriptions for employees are a good idea, especially considering the requirements that employers consider essential job elements in the context of the Americans with Disabilities Act and the Family and Medical Leave Act. Perhaps more valuable is the advice that employers rid themselves of the notion that using a "probationary" period to screen employees protects employers from litigation because probationary employees still may file discrimination claims following termination. Finally, the authors' admonitions regarding progressive discipline and neutral job references following termination could serve a business owner well in this time of increasing employment-related litigation.

The last chapter of Part II provides a lead-in for the rest of the book. This chapter talks about insurance policies with which businesses may be familiar, and it lays out the reasons that these types of insurance are insufficient in the employment liability context. Employers who have a policy covering general commercial liability may be unaware that their general liability policy does not cover employment claims because such claims normally do not involve "accidents" or "bodily injury," which,

according to the authors, the general commercial liability policies are designed to cover. If an employer has read *The EPL Book* through to this point, the following message is clear: 1) at some point in the course of doing business, employers risk litigation for wrongful employment practices; 2) most employers' insurances do not protect them if an employee sues for a wrongful employment practice; and 3) (drum roll please) employers should consider employment liability insurance, which the authors address in the last half of *The EPL Book*.

The book's third and fourth parts provide the meat of the book and the most practical information for business owners and human resources professionals considering the purchase of employment litigation insurance. Part III, entitled "Understanding Employment Practices Liability Insurance," is divided into six chapters, each discussing a different aspect of employment practices liability insurance. This, in conjunction with Part IV, provides readers with a cogent, intelligent discussion and comparison of the employment practices liability insurance policies available on the market at the time of the book's publication.

Part III opens with a discussion of underwriting and application considerations, including which organizations insurers generally cover, how the employer's size affects the policy, the concept of loss history and its affect on coverage, and the impact of an employer's turnover rate on insurance. Along with other considerations, the authors address completing insurance application forms and educate the readers about the various pitfalls they may encounter in the process. The authors also provide useful tips for completing insurance application forms. Again, some of their advice appears obvious, such as "read the entire application." However, they also address problems that often arise when an employer tries to complete the application, such as how to deal with providing confidential information or whether to provide the underwriter with information not specifically requested in the application.

After discussing underwriting issues, the authors turn to the format of employment practices liability insurance policies themselves. Here, the effective, easy-to-read format and language provide readers with a virtual manual on how to read these policies, which employers should find informative and valuable. The authors start with a primer on how coverage under these policies works—on a claims-made basis. Thus, if the employer's insurance is in effect when a claim is made, the employer is covered. *The EPL Book* then talks about what a "claim" is under these policies and provides examples of language that an employer might find in an employment practices liability policy. Further along, the authors use graphic examples to present readers with coverage issues, such as what happens if the events upon which a claim is based occurred before the employer's employment practices liability coverage was in place.

This format, including insurance clause language from actual policies, continues through the rest of Part III. Armed with such information, employers should be able to enter into intelligent discussions and negotiations of Employment Practice Liability Insurance with their brokers and insurers. Here, *The EPL Book* alerts insurance consumers to practices that they may wish to embrace or, at the least, consider carefully before endorsing a particular policy for their businesses. As an example, employers may not be aware of the importance of the “duty to defend” clause in a policy or why they might wish to forego such a clause. The authors also caution readers to watch out for language about deductibles, timing of defense payments under such policies, and, most importantly, the exclusions employers are likely to find in employment practices liability insurance policies and their consequences for the employer’s business—all important considerations before purchasing a policy.

Part IV alone is worth the purchase price. This portion of the book consists of a company-by-company comparison of employment practices liability insurance carriers and their policy provisions. Over 125 pages of the book are dedicated to this comparison, and each comparison worksheet contains a contact name, address, telephone and facsimile number, and, at the beginning, a brief summary of the risks considered, the insurance limits available and the minimum retention. It is doubtful that anyone could gather this comparison as easily and present it as clearly as the authors have in this part of the book; it is their crowning achievement.

The appendices provide equally useful information. Appendix A presents the employer-consumer with a sample employment practices liability insurance application and policy form. Appendix B indexes the various insurers that provide employment practices liability insurance. Appendices C, D, and H provide addresses, locations and telephone numbers for local Equal Employment Opportunity Commission offices, state agencies that regulate employment practices and other labor and employment related agencies. Finally, Appendices E, F, and G present, in a question and answer format, important information about sexual harassment, the Americans with Disabilities Act, and possible disability-related tax credits available to businesses.

Overall, the first half of *The EPL Book* provides a fundamental discussion of employment law which provides the context for the meat of the book—employment practices liabilities insurance. Employers should not use the information in Parts I and II as their textbook for employment practices; rather, as suggested by the authors in these sections, employers should consult labor law practitioners in their respective states before creating and implementing employment policies and practices. If, however, an employer is considering employment practices liability insurance, the second half of the book is extremely useful. A employer-

consumer will save lots of time and, ultimately, money by using *The EPL Book's* comparison of employment practices liability insurance policies available. This book is a recommended addition to any employer's library.