

Loss Control Questionnaire: **Employment Practices Liability**

Provided by TIG Advisors



Examine Your Risk

Employment practices liability is a growing area of concern for organizations across the country. Lawsuits related to employment practices are on the rise. In fact, by some estimates, one out of every five cases in civil courts is an employment-related lawsuit.

Employment practices claims are among the most costly and time-consuming issues an employer can face. What's more, these claims pose a serious risk to an organization's stability, reputation and bottom line. In fact, the average cost of defending and settling an employment law case is \$160,000. No organization is immune to these exposures. Today, employment practices liability claims can originate from lawsuits related to, but not limited to:

- Wrongful termination
- Discrimination
- Harassment and sexual harassment
- Breach of contract
- Retaliation
- Mismanagement of employee benefit plans
- Failure to employ or promote
- Deprivation of career opportunity
- Wrongful discipline

Thankfully, a proactive approach to risk management goes a long way toward protecting organizations from employment practices liability claims. This questionnaire is designed to help organizations assess how adequate their loss control programs are by examining common employment-related exposures and the techniques, policies and procedures that can be applied to control these exposures. Remember, the best defense against employment practices liability claims is to prevent them from occurring in the first place.



GENERAL BEST PRACTICES

	Yes	No	N/A	Notes
Does your organization have a human resources (HR) department or dedicated employees who handle HR matters?				
Does your organization have an in-house legal department?				
Does your organization have access to legal services from outside counsel for employment-related matters?				
Does your organization have a process in place to ensure that it is aware of applicable compliance requirements on the local, state and federal levels?				
Does your organization have procedures in place to stay up to date on changes to employment laws and regulations at the local, state and federal levels?				
Does your organization have employment practices liability insurance (EPLI)?				
Does your organization review its EPLI policy on an annual basis with an insurance professional?				
Does your organization conspicuously display federal and state labor and employment law posters as required?				

EMPLOYEE HANDBOOKS

Employee Handbooks – General	Yes	No	N/A	Notes
Does your organization have an employee handbook?				
Does your organization distribute its employee handbook to all employees?				
Is your organization's employee handbook reviewed by HR or an attorney on a regular basis?				
Does your organization follow the policies set forth in your employee handbook?				
Are all employee handbook policies applied consistently across the organization?				
Does your organization's employee handbook use clear and concise language?				
Does your organization's employee handbook include a provision that establishes your organization's right to modify the handbook?				
Does your organization communicate any changes to your employee handbook to employees when they are made?				
Does your organization's employee handbook include an acknowledgment form that employees must sign and return, indicating				

that they have received and understood the handbook?				
Does your organization’s employee handbook outline standards of conduct and progressive disciplinary measures?				
Employee Handbooks – Specific Policies	Yes	No	N/A	
Does your organization’s employee handbook contain an equal employment opportunity statement?				
Does your organization’s employee handbook contain an anti-harassment policy covering sexual harassment and other discriminatory harassment?				
If applicable, does your organization’s employee handbook contain provisions for “employment at will?”				

RECRUITING, HIRING AND ONBOARDING

Job Descriptions and Job Postings	Yes	No	N/A	Notes
Does your organization develop job descriptions for each specific role?				
Do job descriptions identify the essential job functions that are integral to each specific role?				
Are your organization's job descriptions compliant with nondiscrimination, disability and equal employment opportunity laws?				
Are job descriptions periodically reviewed by legal counsel with experience in employment law?				
Are job openings posted internally?				
Does your organization retain copies of job postings and external job advertisements?				
Employment Applications	Yes	No	N/A	
Does your organization require all applicants to complete a uniform application form?				
Does your organization have a formalized process for collecting, reviewing and retaining job applications?				

Does your organization's application state that it is not an offer of employment?				
Does your organization's application include a provision requiring acknowledgment by the applicant that all the information included on the application is truthful?				
Does your organization's application state that your organization will not discriminate during the recruitment process or at any phase of employment?				
Does your organization's application include a section for an applicant to provide former employer contact information?				
Does your organization's application include a section that states the applicant releases the employer from liability resulting from the use of former employer contact information?				
Does your organization's application avoid inquiring about applicants' health, disability, criminal convictions or arrest records (or other inquires prohibited by law)?				
Is the organization's application form regularly reviewed by legal counsel with experience in employment law?				
Interviewing	Yes	No	N/A	

Do hiring managers receive training on proper interviewing and hiring techniques?				
Does your organization have a prewritten list of interview questions to ask applicants?				
Does your organization understand what interview questions are illegal to ask under federal, state and local laws?				
During the interview process, are your employees asking only legitimate job-related questions?				
Are all applicants for the same position asked the same or similar job-related questions?				
Are interview questions designed to avoid identifying an applicant's age, sex, disability, minority status or any other protected status?				
Does your organization's recruiting or HR department conduct prescreening interviews prior to inviting a candidate to interview with hiring managers?				
Testing	Yes	No	N/A	
Does your organization conduct drug and alcohol testing of applicants?				

Do applicants sign a “consent to drug and alcohol testing” form?				
Does all drug and alcohol testing comply with state, local and federal laws?				
Does all drug and alcohol testing comply with collective bargaining agreements, if applicable?				
Does legal counsel review all drug and alcohol testing procedures and policies on an annual basis?				
Background and Reference Checks	Yes	No	N/A	
Does your organization screen all prospective employees by conducting thorough background checks?				
Is authorization for employee credit and consumer reports lawfully obtained pursuant to the Fair Credit Reporting Act (FCRA) and other applicable laws?				
If your organization uses a third party to conduct a background check pursuant to the FCRA, are applicants prompted to complete a “Disclosure and Authorization to Obtain Consumer Reports” form?				

Are your organization's background checks designed to check only for information needed for security or job-related information?				
Are your organization's background checks conducted with the same rigor for all applicants and employees?				
Prior to making employment decisions, does your organization provide applicants a copy of the consumer report with a written description of the applicant or employee's rights under the FCRA?				
After making an employment decision based on a consumer report, does your organization provide the applicant or employee with a notice of the adverse action, in addition to other FCRA-required disclosures?				
Does your organization screen all prospective employees by conducting thorough reference checks?				
Did your organization obtain the applicant's written authorization before checking their listed references?				
Offers of Employment	Yes	No	N/A	

Are your organization's hiring decisions made by, or subject to, the approval of more than one individual?				
Are your organization's offer letters drafted to specify the terms of employment?				
Are your organization's offer letters drafted to include the start date, salary and benefits?				
Are your organization's offer letters reviewed to ensure they provide for "at-will" employment?				

Onboarding	Yes	No	N/A	
Does your organization have a formal orientation or onboarding program for all employees?				
Are all your organization's new hires given a packet of necessary documents on their first day, including a training schedule and software logins?				
Does your organization provide new hires with all necessary tax documentation, including Form W-4 and Form I-9?				
Does your organization provide new hires with all relevant HR-related forms, for example, direct deposit and emergency contact forms?				

Does your organization's orientation or onboarding program provide education on the company's culture, expectations and policies?				
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PERFORMANCE EVALUATIONS, DISCIPLINE AND TERMINATIONS

Performance Evaluations	Yes	No	N/A	Notes
Does your organization conduct performance evaluations for all employees at regular intervals?				
Are the criteria for your performance evaluations job-related and as objective as possible?				
Are your managers trained on how to conduct proper performance evaluations in compliance with employment law?				
Does HR or management review all performance reviews before presenting them to employees?				
Are employees allowed to review their performance evaluations with their manager?				
Are employees allowed to comment on their performance evaluations?				
Are employees required to sign their performance evaluations?				
Discipline - General	Yes	No	N/A	Notes

Does your organization have clearly expressed, written disciplinary standards?				
Does your organization apply your disciplinary standards uniformly throughout the organization?				
Does your organization provide notice of deadlines that disciplined employees must comply with to avoid further discipline?				
Does your organization use a progressive discipline system in order to provide a chance for employees to correct their behavior?				
Does your organization meet with the disciplined employee in private to discuss the discipline?				
Does your organization selectively use language that explicitly describes the offending conduct, without reference to the employee's character or condition?				
Are warnings issued orally memorialized in employees' personnel files?				
Does your organization maintain written records of warnings, issues and prior discipline, with dates and a signed acknowledgment by the offending employee?				

Are your organization's written records drafted in plain, accurate language that covers the offending conduct in total?				
Do your organization's written records detail the manner in which the offending employee can improve their conduct?				
Do your organization's written records detail the consequences of additional offending conduct?				

Termination - General	Yes	No	N/A	Notes
Does your organization have a termination process that addresses issues starting from the communication of the termination through to its conclusion?				
Does your HR department conduct a full investigation of misconduct or performance sufficient to draw a complete and logical conclusion?				
Does your organization consult with legal counsel when faced with unfamiliar and complex termination-related issues?				
Does your organization ensure that the decision at the culmination of the investigation is equivalent to decisions made in other similar circumstances in your workplace?				

Does your organization create a detailed script to follow prior to terminating an employee?				
Does your organization’s script contemplate what happens after the termination decision is made, including action items such as returning employer property?				
Does your organization ensure that there are at least two organization representatives to witness the termination meeting?				
Does your organization have a reference policy that requires all reference requests to be made in writing and forwarded to HR, not to employees’ direct supervisors?				
Is your organization prepared to transmit any and all benefits plan information by the required deadlines?				

HARASSMENT, DISCRIMINATION AND RETALIATION

Harassment and Discrimination – General	Yes	No	N/A	Notes
Does your organization have a written policy prohibiting unwelcome conduct in the workplace that is based on, or motivated by, the victim's membership in a protected class?				
Does your organization have a separate written policy prohibiting discrimination based on a protected characteristic?				
Do your organization's policies address the potential liability for harassment and discrimination based on all of the following: race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information, among others?				State laws may prohibit harassment and/or discrimination based on additional characteristics.
Does the policy include a statement of zero tolerance with regard to harassment and discrimination?				
Does the policy give explicit examples of conduct that constitutes harassment and discrimination?				
Does the policy include a thoroughly developed complaint reporting procedure?				
Does the policy require prompt reporting of all harassing or discriminatory conduct?				

Does the policy provide a procedure to allow a complainant to bypass a supervisor if that supervisor was the alleged harasser or discriminator?				
Does the company have an internal policy or procedure for thoroughly and promptly investigating employee complaints?				
Do your organization's investigators confirm to the complainant the confidential nature (to the extent possible) of the harassment/discrimination investigation?				
Does your policy include a statement of non-retaliation that effectively allows a complainant to make a claim without fear of retribution?				
Does your organization submit your statement to every employee, both physically and electronically?				
Does your organization require employees to acknowledge in writing their receipt of the harassment policy?				
Does your organization conduct annual training of managers and employees about the company's nondiscrimination, harassment and non-retaliation policies?				
Does your organization review, at least annually, your operating procedures and policies to eliminate discrimination and				

harassment on the basis of a protected characteristic?

Responding to Reports of Harassment and Discrimination	Yes	No	N/A	Notes
After receipt of a harassment or discrimination complaint, does your organization promptly commence an investigation to take remedial action?				
Does your organization take interim measures, when necessary, to avoid further harassment or discrimination during the investigation?				
Does your organization select or designate a neutral and properly trained individual to conduct the investigation?				
Does your organization preserve extensive documentation, including the employee's signed harassment or discrimination policy acknowledgment, notes regarding when the complaint was made and to whom, and the dates of the alleged harassment or discrimination?				
Upon completion of the investigation, does your organization take immediate corrective action that reflects the severity of the conduct, if necessary?				

Retaliation	Yes	No	N/A	Notes
Does your organization have a non-retaliation policy, allowing a complainant to make an accusation without fear of negative consequences?				
Does your non-retaliation policy provide that retaliation is not tolerated, must be reported and will be investigated in a similar manner to harassment and discrimination complaints?				

EMPLOYEE BENEFITS

Benefits Plans	Yes	No	N/A	Notes
Are your organization's employee benefits plans documented in writing consistent with any applicable requirements for written plan documents?				
Do your organization's employee welfare benefit plans (such as group health plans) meet all applicable plan design requirements, such as those imposed by the Employee Retirement Income Security Act (ERISA), Health Insurance Portability and Accountability Act (HIPAA), Affordable Care Act (ACA), Internal Revenue Code and state insurance laws?				
Do your organization's retirement benefit plans (such as pension plans, 401(k) plans or 403(b) plans) meet all applicable requirements of ERISA and the Internal Revenue Code?				
Does your organization have procedures in place to ensure that employee benefits plans are administered in a manner that is consistent with their written terms?				
Are your organization's employee benefits plans provided equally without regard to protected characteristics such as age, sex, race or national origin, disability, health status factor or pregnancy?				

Benefits Plan Communications	Yes	No	N/A	Notes
Does your organization provide employee benefits enrollment information to new employees upon initial eligibility?				
Does your organization provide employee benefits enrollment information to current employees, prior to open enrollment with sufficient time for employees to evaluate their benefits options?				
Do your employees receive clear and consistent instructions regarding how to complete open enrollment on time?				
Does your organization maintain summary plan descriptions (SPDs) for all employee benefits plans subject to ERISA?				
Does your organization distribute SPDs as required by ERISA?				
Does your organization distribute a summary of benefits and coverage (SBC) as required by law?				
Does your organization provide other required notices, such as those required by the Consolidated Omnibus Budget Reconciliation Act (COBRA) and other federal laws at the				

commencement and termination of coverage, or annually, as required by law?				
Does your organization notify employees of changes to employee benefits plans in accordance with applicable requirements?				
Does your organization disclose to employees the yearly changes in contribution limits for retirement plans?				
Does your organization monitor employee contributions to ensure that contribution limits are met?				
Does your organization provide a visible contact person for all benefits-related issues and inform employees where and how to submit questions regarding their employee benefits?				

Employee Leave	Yes	No	N/A	Notes
Does your organization have written, clearly defined employee leave policies, such as PTO, vacation, holiday and sick leave?				
Does your organization communicate leave policies to employees?				
Does your organization have a policy addressing leaves of absence that may be required by law, including family and medical				

leave, military leave and any other leave required under state law?				
Are managers trained to recognize when an employee's request for time off triggers leave rights under applicable laws or employer policies?				
Does your organization have procedures in place for employees to request leave under applicable laws or employer policies?				
Are procedures for employee leave requests communicated to employees? When employees request leave, does your organization provide them with required forms and notifications?				
Does your organization require a fitness-for-duty certification at the end of the employee's leave as a condition for returning the employee to the job?				
Does your organization ensure that employees are not retaliated against for exercising their rights under employee leave laws?				
Does your organization administer leave policies and programs in a manner that does not discriminate against employees based on protected characteristics?				

RECORDKEEPING

General	Yes	No	N/A	Notes
Are your organization's records maintained based on a written record retention policy?				
Are all appropriate documents maintained in personnel files to defend against potential lawsuits, including employee applications, general employment files, evaluations and payroll documents?				
Are all employment-related warnings regarding performance and/or disciplinary issues documented in writing?				
Are medical files stored in a confidential manner wholly separate from other personnel documents?				
Are all documents related to personnel actions kept for at least one year from the date of the action?				
Are all records related to terminated employees kept for at least one year after the date of discharge?				
Are employee benefits plan records, such as fiduciary plan documents, contracts and agreements, participant notices and compliance documents kept for at least six years?				

<p>Are records related to benefits that may be due to participants under employee benefits plans kept indefinitely?</p>				
<p>Are personnel files reviewed annually for compliance with the Americans with Disabilities Act (ADA), Equal Employment Opportunity Commission, and other federal and state requirements?</p>				