

# Coverage Insights

Brought to you by: TIG Advisors



## Employment Practices Liability Trends to Watch in 2021

As an employer, you care about making your workforce feel valued and managing your organization successfully. However, even if you do everything you can to ensure smooth relationships with your staff, employment practices liability (EPL) risks remain. That's why it's crucial for your organization to have EPL coverage. Such a policy can offer protection for claims that result from employees alleging various employment-related issues—such as discrimination, harassment and wrongful termination.

Apart from securing EPL coverage, it's important to stay up to date on the latest EPL market trends. In doing so, your organization will have the information needed to respond appropriately and make any necessary coverage adjustments. Don't let your organization fall behind in this evolving risk landscape. Review this guidance to learn more about EPL trends to watch in 2021.

### The COVID-19 Pandemic

The ongoing COVID-19 pandemic has forced many organizations to make serious workplace changes—such as having employees work remotely, adjusting office setups or conducting significant staff layoffs or furloughs. And with these changes, EPL claims followed. Some of the most common, pandemic-related EPL claims include:

- Allegations that unsafe working conditions or minimal precautionary measures (e.g., poor sanitation practices, a lack of social distancing protocols or inadequate personal protective equipment) contributed to employees getting sick or dying from COVID-19
- Allegations of retaliation after an objection to unsafe working conditions or workplace exposure to individuals displaying COVID-19 symptoms
- Allegations of disability discrimination related to remote working (e.g., failing to accommodate remote staff or denying employees the option to work remotely)
- Allegations related to employee leave concerns (e.g., forcing staff to take leave, retaliating against employees that take leave due to COVID-19 or not allowing staff to take leave due to COVID-19 altogether)
- Allegations of laying off or furloughing staff without providing proper employment notices
- Allegations of discrimination related to laying off or furloughing employees

With these trends in mind, it's crucial to fully document and review any organizational changes created by the COVID-19 pandemic. These changes should be reviewed to ensure they adequately consider the needs of your workforce and are compliant with employment law.

### Social Movements

Several social movements have led to an increase in EPL claims in recent years, including the #MeToo movement and the Black Lives Matter movement.

The #MeToo movement—which is an anti-sexual harassment campaign that was originally founded in 2006 and has gained significant social media attention since 2017—largely contributed to a 50% rise in sexual harassment lawsuits against employers over the past few years, according to the U.S. Equal Employment Opportunity Commission (EEOC). This movement emphasizes how important it is for employers to implement effective sexual harassment prevention measures (e.g., a zero-tolerance policy and a sexual harassment awareness training program), reporting methods and response protocols.

The Black Lives Matter movement—which is a racial justice campaign that was originally founded in 2013 and resurged in 2020 in the form of nationwide protests—has the potential to become a driving factor in race-related workplace discrimination and harassment lawsuits. This movement makes it increasingly vital for your organization to take steps to promote diversity, acceptance and inclusion in the workplace, as well as take any accusations or reports of racism seriously.

## **LGBTQ+ Protections**

Although the EEOC had previously released guidance stating that workplace discrimination and harassment based on sexual orientation, gender identity and gender expression violated Title VII of the Civil Rights Act of 1964, the U.S. Supreme Court just recently confirmed in 2020 that Title VII protects gay and transgender employees from such treatment. While this is a relatively new development, the Supreme Court's decision highlights the need for your organization to ensure all LGBTQ+ employees feel properly supported in the workplace.

## **Age Discrimination**

According to the U.S. Bureau of Labor Statistics, the share of employees over the age of 55 in the labor force is expected to rise to nearly 25% by 2024 (up from 13% in 2001). This demographic shift makes it increasingly important for employers to take steps to minimize the potential for age discrimination issues within the workplace. After all, the Age Discrimination in Employment Act (ADEA) forbids age discrimination against employees and job applicants aged 40 and over.

Despite the ADEA; however, a recent Hiscox study found that 21% of U.S. employees have reported experiencing workplace discrimination based on their age. Such discrimination can lead to poor staff morale, a tarnished organizational reputation and an increase in EPL claims. With this in mind, it's important to review your organization's employment practices to ensure you are fostering a workplace culture that rejects ageism.

## **Wage, Leave and Salary History**

As wage and hour laws continue to change across the country, it's critical that your organization regularly reviews state-specific legislation related to minimum wage, employee classifications (e.g., hourly or salaried), overtime pay, sick leave and other paid time off. A failure to provide your staff with adequate wages or paid leave could lead to various EPL claims.

Employers' ability to receive their employees' prior salary history has also become a rising concern. In fact, in some states, recent legislation now prohibits employers from requesting or requiring salary history from a job applicant as a condition of being interviewed, hired or even considered for a position. In light of these changes, it's best to speak with legal counsel for state-specific employee wage, leave and salary history guidance.

## **Marijuana Legalization**

Following the 2020 election results, medical marijuana is now legal in 36 states and recreational marijuana is now legal in 15 states. As marijuana legalization becomes increasingly commonplace across the country, it's crucial for your organization to review any state-specific legislation and adjust workplace policies and procedures accordingly.

Specifically, some states have enacted legislation that restricts an employers' ability to conduct drug tests for marijuana. Further, several state court cases have ruled in favor of the employee in recent employment lawsuits related to marijuana usage. This includes a case in which a disabled employee sued their employer for alleged workplace discrimination due to medical marijuana usage, as well as a case in which an employee sued their employer for alleged wrongful termination due to a positive drug test for marijuana.

That being said, your organization may need to reconsider or revise procedures related to conducting workplace drug tests for marijuana or basing employment decisions on an employee's marijuana usage, as these practices could potentially contribute to EPL claims. Be sure to consult legal counsel for state-specific compliance guidance on this topic.

## **We're Here to Help**

You don't have to respond to this changing risk landscape alone. We're here to help you navigate these EPL market trends with ease. For additional coverage guidance and solutions, contact us today.

