PROTECTOR PLANS
EXECUTIVE LIABILITY

NAVIGATING THE COMPLICATED WORLD OF HIRING, FIRING, & RETAINING IN 2023

How documentation must guide your actions in these current employment trends

CONTENTS

CURRENT STATE

The current state of employment can be confusing and treacherous for business owners. Many are not only working to get their businesses back to pre-pandemic operations, but are also competing with social and economic factors that have changed workforce demographics and motivations.

Over just a few years we saw the pandemic flip a decade-long low in unemployment with approximately 23 million job losses by May 2020.[1] Soon after, enough workers quit their jobs that the world dubbed it the Great Resignation. Employment climbed its way back up amidst supply-chain issues and a 9.1% inflation peak in 2022.[2] By the end of 2022, U.S. unemployment was at 3.67%[3], but many employers cut workforce numbers to brace for another potential storm in early 2023.

An employer's greatest protection against these headwinds is their ability to maintain sound business practices when managing relationships with employees — and document them appropriately.

1 Georgetown University Center on Education and the Workforce "Tracking COVID-19 Unemployment and Job Losses," 2020
2 CNBC "Here's the inflation breakdown for December 2022 - in one chart," January 12, 2023.
3 Statista "Total employment and the unemployment rate in the United States from 1980 to 2021, with projections until 2027," February 21, 2023.

3 KEY EMPLOYMENT TRENDS FOR 2023

What do hairstylists and doctors have in common? How about business executives and warehouse workers? These and more could all be subject to three key employment trends surfacing and posing a challenge to business owners:

01

FEDERAL TRADE COMMISSION

Proposed Federal Trade Commission (FTC) rules on noncompete agreements

02

DEPARTMENT OF LABOR

A tightening of Department of Labor (DOL) independent contractor classification

03

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

An increase in enforcement from the Equal Employment Opportunity Commission (EEOC)

In the first quarter of 2023, new rules were proposed by the FTC and DOL to ban post-employment noncompete agreements as well as expand the classification of an 'employee' and overtime requirements, while the EEOC will increase and shift its enforcement priorities simultaneously.

These actions will change the landscape of hiring, firing and retaining workers in 2023 and beyond, should they take hold. Here's what you need to know:

TREND

01

THE FTC RULE REGARDING NON-COMPETE AGREEMENTS

Noncompete agreements have traditionally been used to protect employers and their trade secrets from competition by preventing employees or independent contractors from taking knowledge or clients with them to competitors or becoming direct competitors themselves. These agreements impact approximately 18% of the U.S. workforce.[4]

The new rule proposed by the FTC in January 2023 seeks to prevent employers from entering into noncompete clauses and to require the dissolution of all existing noncompetes. Recent communications by other arms of the federal government, like the National Labor Relations Board (NLRB), make it clear that this mandate continues to gain traction.

Passing this new rule will have major ripple effects in industries from law to healthcare and tech. For starters, employers would lose a major barrier to attrition. Many organizations would need to reevaluate their pay and benefit structures to challenge external offers.

Then there's the issue of protecting intellectual property, or in the case of healthcare, patient identities. For example, many dentists who do not own their own practice are independent contractors and subject to noncompetes that protect the practice's service model and approach to the patient experience, often within a designated geographic radius of the practice. The last thing a practice wants is for one of their contractors to open up a competing office in their community using the techniques they learned on the job.

These practices will need to carefully examine their staffing procedures as federal agencies continue to pursue limitations on noncompetes with the NLRB weighing in on May 30, 2023. While the National Labor Relations Act carves out independent contractors from being under its purview, the NLRB's general counsel now believes that noncompetes are mostly violative of employee's Section 7 rights, specifically stating that, "a desire to avoid competition from a former employee is not a legitimate business interest that could support a special circumstances defense." This directive also specifically speaks to the agency's focus on misclassification of independent contractors, telegraphing a likelihood of intent of further action in that regard.

4 Federal Trade Commission "FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition," January 5, 2023.

TREND

02

CHANGING EMPLOYEE CLASSIFICATIONS & PROTECTIONS

Employers are also facing the DOL's proposed modifications to independent contractor classification. If approved, this would reclassify many independent contractors as employees if they were deemed "economically dependent" on the company. This would entitle them to more protections including overtime pay and benefits.

Also under consideration is the salary threshold for non-exempt employees, which if raised would open even more of the workforce up to overtime eligibility.

Organizations that respond by moving hourly employees to a salary structure will need to pay close attention to their state's pay frequency laws. Depending on the state and employee classification, a worker could be entitled to a paycheck every week, month or more often.

What is important to note is that both the FTC and DOL proposals are in line with other industry trends to advance workers' rights and protections.

As companies are jumping at biometric data for its potential to reduce the risk of security breaches, data privacy statutes are popping up in states like Illinois to restrict the collection and storage of such data, and employers will need to follow such protocols.

Requirements for mental health accommodations are also changing as society starts to better understand non-visible disabilities. With one in five people estimated to experience some mental health condition in their lifetime, employers are expected — and required — to make reasonable accommodations or face EPL challenges.[5]

5 U.S. Department of Labor: Office of Disability Employment Policy "Accommodations for Employees with Mental Health Conditions," 2023.

The jury is still out on the number and severity of wage and hour claims that may arise from this rule. As a fact, wage and hour indemnity coverage in EPL policies is not uniform. It can be addressed with sublimits, a separate retention, defense-only cost language or possibly even excluded outright. As a result, employers should review their EPL policy with their broker.

TREND

03

CHANGES TO THE U.S. EEOC WILL IMPACT EMPLOYERS

With the EEOC under new leadership, employers should expect a shift in enforcement priorities with more focus on harassment, equal pay protection and protecting vulnerable workers.

In their proposed strategic enforcement plan for fiscal years 2023-2027, the Commission seeks to expand the category of vulnerable workers to include people with intellectual and developmental disabilities, those with arrest or conviction records, LGBTQI+ individuals, those employed in low-wage or temporary jobs, those with limited literacy or English proficiency and older workers.

Alleged discrimination charges under Title VII of the Civil Rights Act of 1964 accounted for 61% of the EEOC cases filed in 2021 (the most recent year on record), while 53% of these cases were for sex discrimination, 17% were for race discrimination, 4% for national origin discrimination and 3% for religious discrimination. In addition, 27% of cases were filed under the American with Disabilities Act (ADA) and 7% the Age Discrimination in Employment Act.[6]

The proposed expanded protection and classification of vulnerable workers in 2023 will require employers to be even more diligent with their language and documentation before, during and after an employee is terminated and enforces the need for EPL insurance.

Long-term employees don't shelter their employers from EPL claims — even class action ones, or those that a government entity is willing to fight for, putting the business owner at great risk.

Consider the following real EPL claims scenario:

The owner of a small business faced discrimination charges from the EEOC after laying off a long-term, employee whose post-pandemic behavior did not align with the practice's expectations. The EEOC charge failed to cite the employee's initial refusal to return to the office and her sudden and dramatic disregard for the employee dress code once she finally did. Instead, their charge claimed the business owner intimated it was the employee's skin color that suddenly "wasn't a good look" for their front desk.

6 Seyfarth "EEOC-Initiation Litigation," 2023.

HOW EMPLOYERS CAN PROTECT THEMSELVES

Now is the time to button up all employment processes. Take extra care when considering restrictive covenants such as non-solicitation, non-recruit or confidentiality clauses. While not explicitly noncompete agreements, under the proposed FTC rule the title of the clause is not the determining factor of its intention. Employers will need to ensure the scope of each employment agreement is narrow and specific enough to not function as a noncompete.

Then, hire and fire smartly. Collect thorough documentation during the hiring process, including notes on any promised benefits, signing offers and any red flags with each candidate. All promises to employees should be met, and any concerns should be noted for the future.

When in doubt, document.

IF IT WASN'T DOCUMENTED, DID IT HAPPEN?

Best intentions count for very little when there isn't any proof to back up an employment decision.

It doesn't matter the size of the organization or the number of people who can provide testimony. There is ample room for dispute when it's all hearsay. Even in today's digital world, where an employee can be captured on screen being rude to customers, a company would struggle to justify such a termination without the proper misconduct documentation.

While formal, uniform documentation is always preferred, even a timestamped, self-sent email could serve as verification of a performance concern for later reliance at the time of an employee's firing.

But instead of relying on managers to remember to send a quick note, employers should establish systems to support by-the-book employment practices.

Employers can start by looking at three main areas in their employment structure: management's understanding of protected classes of employees, the hiring process and the firing process.

01 AWARENESS OF PROTECTED CLASS

Protected classes of employees, under the law, are groups of people who are legally safeguarded against discrimination based on key identifying characteristics. There are eight main protected classes under the Americans with Disabilities Act (ADA): race, color, religion, sex, national origin, age, disability and genetic information.[7]

This does not mean that an underperforming or problematic employee in a protected class cannot be terminated, but these laws put the onus on the employer to ensure and prove that all hiring or firing decisions are based on performance or business circumstance.

There are *two steps* to this responsibility:

1. *Know the ins and outs of protected classes.* This goes beyond knowing the classes but extends into knowing the employees. An employer should reasonably understand which protected classes their employees fall under — if properly communicated, it should be documented in their personnel file — and in what ways they are protected by law. Take pregnancy, for example. Not only does an employer need to understand pregnancy as a protected characteristic under sex discrimination laws, they need to accommodate reasonable requests such as light duty or maternity leave where applicable. The employee's participation in these benefits should not cause harm to their state of employment.

2. *Document everyone equally.* If a company is hyper vigilant about documenting a particular employee who happens to fall under a protected class but not their colleagues, this could appear discriminatory and cause for suit. Best practice is to document all employees equally and thoroughly. Start during the hiring process by noting the appropriate positives and negatives of each candidate, as the consistency of an organization's documentation process should be unquestionable and back up any employment decision.

02 THE HIRING PROCESS

The foundation of a strong hiring process is consistency. Not only can it save time and make it easier to assess candidates, it can facilitate fair hiring and support the organization against any future job qualification or expectation disputes.

7 U.S. Equal Employment Opportunity Commission "Who is protected from employment discrimination?" 2023

The backbone to a consistent hiring process is documentation. If all communication, references and assessments are documented, employers can make sure each candidate receives the same information, is evaluated on the same criteria and understands the expectations of the role.

Here are *four best* practices to building a consistent and well-documented hiring process:

1. *Start with an accurate job description*. If the job requires the worker to lift 100 pounds but it wasn't listed in the job description, the employer may not be able to lawfully fire them once hired for not meeting that expectation. It is possible to disqualify an applicant who does not meet a qualification that is stated in the job description, as long as the employer can justify that requirement.

2. *Stay neutral in documentation and reporting.* Hiring decisions cannot be based on emotions. Personal opinions are risky for employment practice liability. When documenting an applicant's experience and interview performance, it is important to stick to the facts. Note both the positive and negative aspects of each candidate in relation to the job qualifications.

3. *Formalize the offer process*. A great way to do this is with a hiring letter that records the terms of employment. This letter should be consistent across positions within the office, including the same data points such as pay, sign-on bonuses, benefits, performance review schedule and all other key terms decided upon hiring.

4. *Follow up with each applicant*. It's a good practice to reach out to each applicant, even to notify them that they were not chosen to move forward in the process. Stay generic and consistent. There is no need to explain the reasons why they did not qualify.

Coverage Mistakes to Avoid: At-fault employers pay more during a claim without indemnity coverage

While the premiums may be higher, business owners do not want to be found without indemnity coverage when an 'at fault' ruling comes in.

Consider the following real claims scenario:

A California dental office terminated the employment of a recently diagnosed stage 4 cancer patient who needed one day off each week for chemotherapy. With a documented raise the month before dismissal and no documentation of poor performance, the insured settled for $220,000 but their professional liability policy only covered $25,000 in defense costs for the EPL exposure. Had a stand-alone Employment Practices policy been purchased, the insured would have had broader protection, making the additional premium worthwhile in this scenario.

WHAT IS "RIGHT TO WORK," & WHEN DO EMPLOYERS GET IT

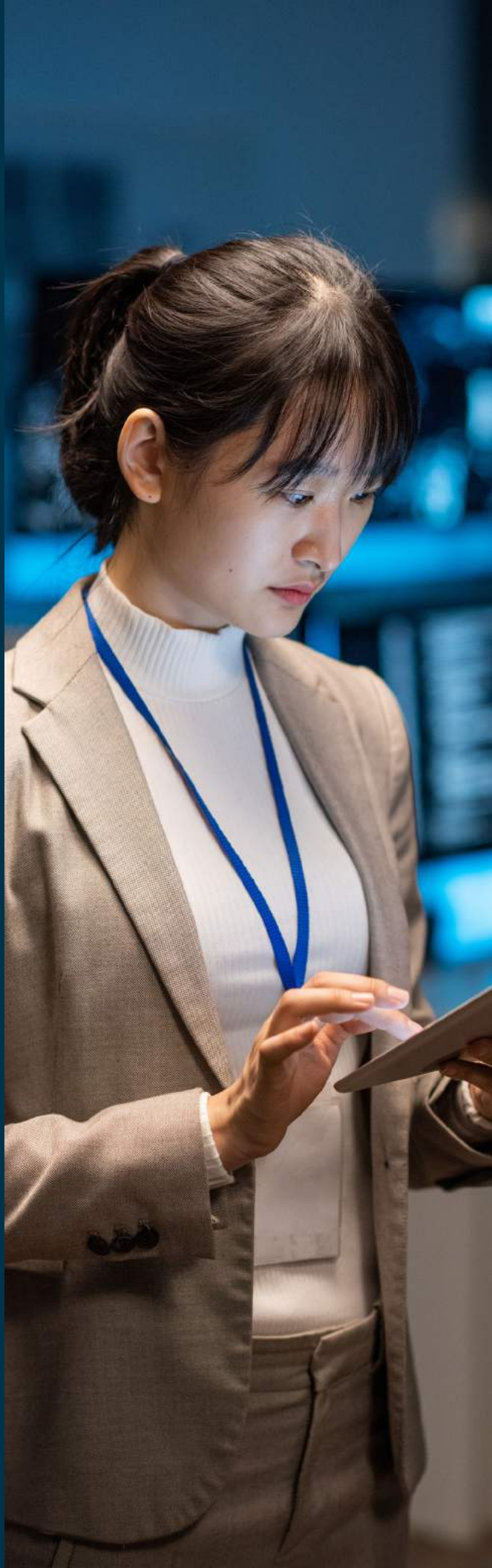
Right-to-work (RTW) laws may give workers the freedom to choose whether or not they join a labor union, but they do not give employers the right to hire and fire at will.

The danger to employers in the 26 states that enact RTW laws is this misconception that federal protections can be disregarded. Federal law typically preempts state law — in this case, the ADA and other federal labor employment laws that protect workers against a wide variety of discrimination. Under these laws, employers are required to present reasonable accommodations for any worker with a disability and employment decisions cannot be made based on any of these protected classes:[8]

- Race
- Color
- Religion or creed
- National origin or ancestry
- Sex (including gender, pregnancy, sexual orientation, and gender identity)
- Age
- Physical or mental disability
- Veteran status
- Genetic information
- Citizenship

The fine points of defining these evolving classes are often the source of disputes. It is an employer's responsibility to understand what qualifies as a disability and protected class.

For example, as of 2021, long COVID-19 is covered under the ADA.[9] And it's not only important to know that age is a protected class but that any employee over the age of 40 is protected under this classification.



8 Thomson Reuters Practical Law "Protected Class," 2023.
9 U.S. Department of Health and Human Services "Guidance on 'Long COVID' as a Disability Under the ADA, Section 504, and Section 1557," July 26, 2021.

03 THE FIRING PROCESS

"Everyone knew that person wasn't doing their job," doesn't stand up in court.

What if the manager that initiated a termination is no longer with the company when a discrimination claim is made and there's scarce documentation?

Trying to gather documentation after the fact is one of the hardest ways to defend a discrimination charge. If the documentation does not exist, it cannot retroactively be created.

To match their strong hiring process, here are *four best practices* for employers to build consistent firing processes:

1. *Always submit something.* Ideally, there is a designated form for firing managers to fill out. In circumstances where this form is unavailable or time does not permit, the firing manager should send a timestamped email or text message to the HR department to be included in the personnel files. In this case, function is more important than form.

2. *Cool down before documenting.* Emotions should not play a role in the firing process. A clear head and cool temperament are preferred when documenting an employment incident. Plaintiffs' attorneys can spin emotion into proof of bias.

3. *Focus on the specific performance issue.* This is why written communication of the job expectations during the hiring process is so important. There should be no room for surprises. If an employee continues to not meet performance expectations, there is cause for termination. However, if either the expectations or the performance issues go undocumented, there is an open door to dispute the dismissal.

4. *Be consistent in the review process.* If one employee receives more leniency, it could appear as favoritism and unfair employment practices. A good rule of thumb is that there is no such thing as overcommunication. The review process should tell a consistent story about the individual employee as well as the importance of employee performance across the organization. "They weren't a good fit," is not a legally appropriate cause for termination.

Critical Insurance Buying Mistakes to Avoid: Over-prioritizing professional liability and neglecting EPL

Simply having EPL coverage without associated Indemnity Coverage does not prevent out-of-pocket expenses when a claim is made. Just as limits matter for professional liability, employers should thoroughly understand if their insurance covers only the legal and other costs of defending a claim or if it also covers potential damages settlements or judgments.

Consider this claims scenario:
A dentist in Washington was accused of sexual harassment by multiple employees. With only defense coverage, and a $25,000 sublimit added to his professional liability policy, these multiple claims exhausted his coverage quickly. He was saddled with a $1 million+ verdict after relying on his own attorney, and then closed his business, relocated and filed for bankruptcy.

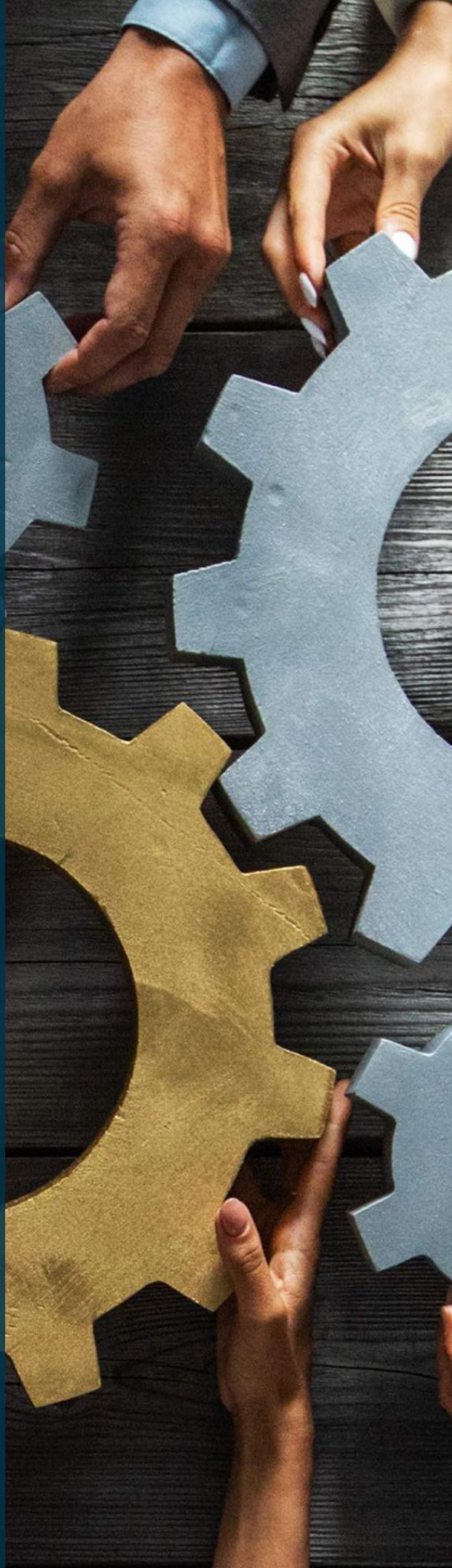
Even when it feels impossible to stay on top of shifting employment laws, employers can help protect themselves with one key process: documentation! Consistent documentation across all employees can help business owners avoid hot water when it's time to make a tough employment decision. Providing the same level of evaluation and documentation for employees across classes can not only confirm performance issues with specific individuals, but protect against allegations of discrimination.

COVERAGE MISTAKES TO AVOID: RELYING ON INSURANCE INSTEAD OF KNOWING THE LAW

Knowing and complying with the law is a business owner's first defense against certain fines and penalties. When mistakes are made, employers can rely on strong legal counsel but ignored and unreported errors will only escalate matters over time. In many mediations, the alleging party's need to be acknowledged is a hurdle that once overcome leads to more rapid resolution through communication.

Consider the following real claims scenario:

An employer in the Midwest was summoned by the U.S. DOL for Fair Labor Standards Act violations due to a timekeeping discrepancy and a misunderstanding of U.S. overtime policies by the company's management. Engaging the injured parties, paired with the fast action and cooperation of their legal team, saved the employer from a criminal investigation and punitive fines. The employer paid the owed back wages, but without proper insurance provided by a reliable company with an experienced claims team the consequences of their mistake could have been a lot worse!



THE CRITICAL ROLE OF EMPLOYMENT PRACTICES LIABILITY INSURANCE

An employer can do everything right and still be served an EEOC notice. Employment Practices Liability Insurance (EPLI) typically protects against liability from false allegations just as much as accurate ones. Even claims that aren't legitimate or don't hold up in court ultimately cost business owners real money to defend.

Employment Practices Liability Insurance is a business's protection against claims of discrimination, harassment, retaliation and wrongful termination, and with such claims on the rise, it is just as important as professional liability coverage. Broad form EPLI will cover a business for defense costs, indemnity and third party claims.

Smaller businesses often argue that their staff is one big happy family, but the reality is this is simply not true. Employees have certain expectations of their employers, and even long-term, reliable employees can seize an opportunity for personal gain.

Business owners have a lot on their plates and managing an EEOC claim can be stressful — not to mention a costly expense you're not prepared for. Utilizing EPL coverage through a highly rated carrier is an efficient risk transfer for this exposure. Added benefits often include "duty to defend" language and 100% defense cost allocation.

Business owners make their living selling their passion, not defending lawsuits. Engaging expertise, particularly in the event of frivolous allegations, can save the business valuable time and money.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