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'Tis The Season For EPLI Claims

By Wayne E. Bernstein

In today's sizable workforce, people from all walks of life interact with one another in the course of the workday. As a result of this interaction, people on many different levels develop working relationships.

From employees to vendors to salespersons to customers, these relationships for the most part tend to be friendly, cordial and professional. In many instances, once these individuals have had a chance to become more acquainted with one another, they may feel comfortable enough to share some personal stories and experiences, tell some jokes or just have some general conversation.

From an employer's perspective, this interaction may seem innocent enough, and in most situations there is no need to be overly concerned. However, under some circumstances, there may be a negative effect of this socializing, which could spell trouble for the unsuspecting employer.

To help illustrate what may go awry, consider the following employment related claim scenarios:

• The daily letter carrier has been making suggestive remarks or unwanted sexual advances to your receptionist.

• One of your salespeople has been telling ethnic or racial slurring jokes that have offended a number of your customers at a golf outing.

• One of your customers has humiliated or belittled your department manager at the industry convention.

• One of your employees makes offensive or disparaging remarks to your most important vendor.

There are no definitive solutions to help alleviate these problems.

For employers today, this has become an even more challenging situation, especially when claims or allegations of this nature may be reported by vendors, customers or other "third parties."

The question of how an employer can prevent and control the conduct or actions of "third parties" who are not their employees is a compelling one.

While the employer cannot necessarily prevent the behavior or actions of these individuals, the employer can be held accountable and liable to the injured parties. In suits related to such situations, the employer may be found equally as guilty as the perpetrator of such conduct, if the employer merely stands by and does nothing to help mitigate the problem once it is made aware that a problem exists.

All of the claim scenarios mentioned earlier involve employees dealing with "third parties" in one form or another.

In the case of the secretary being sexually harassed, the perpetrator of the offense is the letter carrier, who is a "third party" and not an employee.

If the employer was informed of these incidents and did not take immediate steps to correct the situation, the secretary could bring a sexual harassment suit against her own employer even though the perpetrator was not an employee.

In a 1992 sexual harassment case, *Powell v. Las Vegas Hilton Corp.*, a casino worker alleged a hostile environment existed when customers had told her that she had a "nice body," stared at her, and made other suggestive remarks. The U.S. District Court for Nevada agreed with the worker and held the employer liable.

If an employer takes no action once it is made aware of a "hostile environment," then that employer has violated the employee's right to a safe work environment.

Often, an entire class of third-party claimants makes a claim alleging numerous offenses, as was the case when the salesperson made ethnic or racial jokes at the golf outing. This type of claim could have severe implications, because a number of people may allege different causes of action, such as humiliation, discrimination, etc.

Again, if the employer does not take quick and decisive action to mitigate the situation, the employer can be liable.

We must also understand that in today's litigious environment, even if steps are taken to diffuse the situation, it may already be too late, since the damage has already been done in the eyes of the victims.

Third-party claim exposures have always existed, but over the past few years, the potential to be involved in such a suit has dramatically increased. Yet most employers have not recognized the risk and taken the necessary precautionary steps to minimize this significant exposure.

How can employers protect themselves from these types of work-related claims and allegations?

In most situations the best method for prevention may be education.

Providing company personnel with written guidelines outlining the con-

Wayne E. Bernstein, CIC, works for e-perils.com, a Los Angeles-based division of Worldwide Facilities, an independent insurance wholesaler specializing in Cyber Insurance, directors and officers insurance, EPLI, as well as various professional liability products.

duct that is expected can help avoid these potential risks from its employees and from third parties, such as customers and vendors.

Personnel should be made fully aware that this type of conduct will not be tolerated either—inside or outside of the office—sand that a zero-tolerance policy is in effect.

In addition, a written complaint procedure should be implemented for reporting and documenting incidents when they first occur.

At the same time, company personnel should be assured that all reports and complaints made would remain in the strictest confidence.

When a claim or suit is made against an employer, the organization's first inclination might be to present this type of claim to their commercial general liability insurer. Most current CGL policies, however, specifically exclude "employment-related" claims.

An employer should not rely on this approach because if the allegation is purported to be an "intentional act," the CGL policy will not respond since intentional acts are specifically excluded from coverage.

The CGL policy does not cover damages or awards in employment cases and, in the best-case scenario, will only advance defense costs until a final coverage determination is made.

Employment practices liability insurance policies address employment-related claims exposures. However, the basic policy is not enough to provide protection for third-party claims.

Most insurance companies now offer a third-party coverage endorsement, which must be specifically requested when negotiating the coverage. As with any coverage, there are those classes of businesses, such as airlines or entertainment risks, which the underwriters will shy away from. However, if the company is willing to grant this enhancement, it can provide a great benefit to any organization's EPLI policy.

When the third-party liability coverage endorsement is added to the policy, the definition of the named insured is not amended. Instead, the insurer generally modifies the language of "wrongful acts" to broaden coverage for "customers, clients or other natural persons, other than the employee…of the insured entity," or some similar wording.

In a third-party or "vicarious liability" claim, it is very likely that the named insured did not cause the claim, but may be legally liable for the damages resulting from such a claim, hence the reasoning for broadening the wrongful acts definition.

Depending on the insurer and current market conditions, the cost for the third-party coverage endorsement can range from 5 percent to 20 percent of the annual premium.

With all things considered, the endorsement can be a worthwhile investment for any employer, since the stakes can be very high. **NU**