

INSURANCE RECOVERY GROUP

CALIFORNIA DECISION SHOWS THAT COMPANIES MAY OBTAIN INSURANCE COVERAGE FOR WAGE AND HOUR CLAIMS

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2016 is expected to be a record-breaking year for wage and hour claims, with more than 9,000 lawsuits anticipated by year-end. These lawsuits are being filed against companies by both private litigants and government enforcement agencies. Companies may not be aware that insurance coverage may be available for these types of claims under an existing policy and/or through the purchase of a new insurance product that has been developed to respond to such claims. A recent California federal court decision shows that companies should start by pursuing coverage under their existing insurance policies.

The United States District Court for the Southern District of California ordered Hanover Insurance Company (“Hanover”) to pay defense costs under an Employment Practices Liability Insurance (EPLI) policy for a class action lawsuit brought against its insured, Bellus Academy, which alleged wage-related claims. *Hanover Insurance Company v. Poway Academy of Hair Design, Inc.*, No. 3:15-cv-00536 (S.D. Cal. Nov. 14, 2016). Bellus Academy runs a system of beauty colleges and, as part of its corporate policy, has required students to work at a training salon in which clients pay for services. Bellus Academy’s

former students initiated a class action alleging, among other claims, that Bellus Academy failed to compensate them for the services they provided. After Bellus Academy sought coverage for this lawsuit under the Hanover policy, Hanover filed a lawsuit seeking a declaration that it had no obligation to provide defense and indemnity coverage, and seeking reimbursement of defense costs it had paid previously.

Hanover relied on a broad wage and hour exclusion in the policy that barred coverage for claims “based upon or attributable to . . . [a]ny violation of any of the responsibilities, obligations, or duties imposed by any federal, state or local statutory or common law . . . that governs wage, hour and payroll policies and practices, except the Equal Pay Act.” There was no dispute that five of the six claims asserted in the class action fell within the scope of the exclusion. However, the underlying lawsuit also asserted that Bellus Academy violated California Labor Code § 2802 by failing to reimburse the reasonable business expenses its students incurred while performing services for paying clients. Hanover argued that this claim also was barred by the wage and hour exclusion. After examining the purpose of § 2802

and California cases interpreting the statute, the district court rejected Hanover’s argument, reasoning that § 2802 is not a wage and hour law.

Because the § 2802 claim was covered under the policy, the court considered whether Hanover was entitled to reimbursement of defense costs. Like the law in many states, California law obligates insurers to **pay the entire defense of a lawsuit** that alleges both covered and uncovered claims subject to the insurer’s right to reimbursement. To obtain reimbursement, however, the court stated that **Hanover** was required to show that “the defense costs it seeks to recover are **solely allocated to claims that are not even potentially covered.**” Because Hanover failed to meet this burden, the court denied its request for reimbursement of defense costs.

Given the growing risk of wage and hour lawsuits, this case demonstrates the important lesson that companies should not assume that coverage is not available for these claims. In some instances, companies may be able to purchase specific coverage for wage and hour disputes, at least to cover defense costs. Moreover, even if an EPLI policy contains a

broad wage and hour exclusion, a lawsuit may nevertheless be covered depending on the specific allegations of the complaint and the requested legal relief. In many states, if there is even a possibility that one allegation in the complaint may be covered, the insurance company may be required to defend the entire lawsuit. When faced with a complaint alleging violations of the Fair Labor Standards Act or similar state statutes, policyholders should carefully assess the language of their policy, the allegations asserted in the lawsuit, and applicable state law. Lowenstein Sandler's Insurance Recovery Group can help policyholders undertake this analysis.

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