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Will Companies Have Insurance Coverage for Employment Decisions Flowing From COVID-19?

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The novel coronavirus, COVID-19, has led to the most challenging economic times in recent memory. Entire industries have been forced to shut their doors, and the unfortunate but practical reality is that businesses will make hard decisions about their employees (layoffs and furloughs have already begun). Goldman Sachs predicted that unemployment claims could increase by 700 percent, with more than 2 million Americans seeking unemployment relief. In making difficult personnel decisions, employers must consider the availability of insurance coverage for claims that will inevitably follow.

In the short term, many employers will focus on workers' compensation-related claims where employees will seek benefits when they miss work due to an illness associated with COVID-19. For the most part, those coverage determinations will center on whether the employee contracted the virus during work-related travel to locations known to be epicenters. In other "gray area" cases, the availability of coverage will hinge on whether the employer can demonstrate to the workers' comp insurer that the employee contracted the virus "during the course of employment."

Once the immediate illness-related claims are addressed, employers inevitably will be forced to confront liability claims brought by employees when reductions in force, or other adverse employment decisions, take place. Employment practices liability (EPL) insurance is the main source of coverage for non-bodily injury claims brought by employees. EPL insurance typically provides coverage for claims by employees for wrongful acts by their employers during the employment process, such as wrongful termination, harassment and discrimination. In the context of claims resulting from the COVID-19 pandemic, there undoubtedly will be wrongful termination claims, but there also will be a number of unconventional claims.

Traditional claims include failing to provide the requisite notice under the WARN Act prior to conducting layoffs, wage-and-hour violations of the Fair Labor Standards Act for failing to pay overtime wages, violations of the Family and Medical Leave Act for failing to provide the required amount of sick leave, and violations of the Occupations and Safety and Health Act for failing to provide a safe workplace or discriminating against employees who demand one. Novel claims may include injuries related to contracting COVID-19 at work or while traveling for work, and termination due to a refusal to come to work or work from home when required.

EPL insurance policies may contain exclusions for certain of these claims, but coverage likely will be available for many of the claims that will be asserted. For example, most EPL policies exclude coverage for bodily injury. But many provide an exception for claims alleging emotional distress. As another illustration, many EPL policies bar coverage for wage-and-hour claims but, more recently, many insurers now offer coverage for the cost of defending wage-and-hour claims, and some courts, most notably in California, have construed such exclusions more narrowly than insurers seek to apply them. Ultimately, there are a number of steps that proactive businesses can take to maximize the potential for coverage under their EPL insurance policies.

1. Review the language of policies carefully. The language of EPL insurance policies varies from policy form to policy form. What is typically excluded under one policy may be covered under another. Moreover, businesses should keep in mind that there are certain rules of insurance interpretation

that favor policyholders, including that ambiguous language is construed in favor of coverage.
2. Provide timely notice of all claims. This may seem obvious, but what constitutes a "claim" may be surprising. In some instances, even an oral demand for damages may suffice, so it is important to understand how "claim" is defined in the policy. Additionally, if your company uses a professional employer organization (PEO), there may be coverage available under the PEO's EPL insurance policy, but it is important to assess whether the PEO's approval is necessary before undertaking any employment decisions and to review any notice requirements in both the policy and the PEO agreement.
3. Insurers are already circulating drafts among themselves of a COVID-19 exclusion that they plan to add to policies at renewal. To counter the insurers' effort, employers should provide a "notice of circumstances" for any potential claim that they reasonably anticipate will be made in the future relating to COVID-19. EPL policies typically are claims-made policies, meaning that they provide coverage for claims made during the policy period but not afterward. However, if your company anticipates that claims could be made, it can preserve coverage under the existing policy by providing notice of circumstances that may later give rise to a claim. If the claim is in fact later asserted, it then will be considered to have been made at the time the notice of circumstances was provided.
4. Even when allegations in a lawsuit appear to be excluded, do not assume there is no coverage for the suit. A general legal principle in most states is that, if even a single allegation is potentially covered by the policy, the insurer has an obligation to provide coverage for the defense of the suit.
5. Remember that choice of law often matters when coverage disputes arise. Not all courts are created equal when interpreting policy language and the scope of exclusions. Therefore, it is crucially important to consult with experienced coverage counsel sooner rather than later. Locking in a more favorable jurisdiction for your dispute could mean the difference between coverage and denial of claim.

To see our prior alerts and other material related to the pandemic, please visit the Coronavirus/ COVID-19: Facts, Insights & Resources page of our website by clicking here.

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