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Using a Professional Employer Organization? Check for Employment Practices Liability Insurance

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Professional employer organizations provide human resources solutions for small and mid-size businesses. In the US, PEOs serve more than 175,000 small and mid-sized businesses, which represents 15% of all US employers with 10 to 99 employees, according to the National Association of Professional Employer Organizations. In addition to handling human resources matters, payroll and employee benefits, some PEOs offer employment practices liability insurance – which provides their business clients with liability and defense coverage for claims brought by employees for "wrongful employment acts," such as wrongful termination, harassment, retaliation, discrimination and other workplace torts.

While engaging a PEO provides great value to many small, mid-size and emerging companies, all companies should be sure to evaluate their PEO's EPL offerings carefully. As discussed further below, depending on the quality and amount of coverage, it may be prudent for a business to purchase additional coverage to have adequate protection. If you purchase additional EPL insurance, the PEO policy will sit in excess of your other insurance. Sometimes, you can purchase EPL insurance as part of your directors and officers policy.

Here are some tips and considerations when evaluating EPL insurance offered through your PEO:

- **Get a copy of the policy sooner rather than later**. Some companies aren't aware that they have EPL insurance through their PEO until a claim arises and their counsel asks about it. Don't wait that long! EPL insurance is a real benefit, as even meritless claims can be a huge financial burden on a company, and it can take a while to get a copy of your policy from the PEO. When engaging a PEO, ask for a copy of the EPL policy – not just a summary – at the outset. If you have questions about the policy that the PEO can't answer, ask to speak to their broker.
- **Evaluate the key terms and assess whether the policy sufficiently covers your needs**. A PEO's insurance policy will be a generic policy that applies to many client companies. Unlike in the usual marketplace, there's no opportunity to negotiate the terms of the policy or its limits. Therefore, you'll be reviewing the policy primarily to assess whether you should consider additional EPL insurance. In particular:
    - Check whether it covers third-party claims, which are brought by nonemployees (generally customers) making allegations that an employee engaged in conduct such as harassment or discrimination.
    - Confirm there is coverage for your subsidiaries (if you have them) and their employees.
    - Look for a wage and hour supplement that at least covers defense costs, as EPL insurers will often have a sub-limit to pay for defense costs.
    - Familiarize yourself with which law firm(s) will be appointed as defense counsel, as there is likely no flexibility to use the attorney of your choice. In other EPL policies, you can potentially negotiate panel counsel.
    - Understand who is a "work-site employee," because only the entity and its work-site employees are covered under PEO EPL policies. This may not include independent contractors or leased employees, who can be covered under other EPL policies.
    - Review the limits of liability (both per company and aggregate) – the aggregate is the most that the PEO will pay during the policy period for all its client companies. Theoretically, those limits could be eroded by other client companies before your company's claim comes in.
    - Note the retention, as there may be lower retentions available in the market.
- **Carefully review notice requirements**. It is critical to abide by the policy's notice requirements and to provide timely notice of any claim under the policy to ensure the best chance of coverage. Notice requirements in your EPL policy through a PEO will be different than in a standard policy. Make sure to review the policy and the client service agreement, as relevant provisions may exist in both. Often the client company will be required to notify the PEO of an EPL claim within 72 hours. The company will provide notice to the PEO, which will then provide notice to the carrier, because the PEO is the named insured. Make sure you know ahead of time which contact at the PEO you should be noticing. Once again, earlier is better –

because the PEO (as opposed to your company) will be directly communicating with the insurer, communication can be slower.

- **Cancellation of the PEO relationship probably means cancellation of your EPL policy.** If your company ends its relationship with the PEO and only has EPL insurance through the PEO, it may create a gap in coverage. If you are considering terminating a PEO relationship, check your policy's status and talk to a broker to obtain continuity of coverage in a new EPL policy.

We hope these pointers help companies evaluate whether their EPL insurance through their PEO is sufficient, and we encourage companies to make the most of this real benefit (among others) that PEOs provide. While this article focuses on EPL for employers utilizing a PEO, employers of all sizes – including those not using a PEO – should check their EPL coverage and consider obtaining coverage if they do not have an EPL policy. If you have any additional questions on this topic, the Cooley insurance team is happy to assist.

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