



Antitrust and Employment Practices Liability Exposures.....

Trade and professional associations face a myriad of risks on a daily basis. Most associations are acutely aware of the risks inherent in owning their buildings and property. However, associations may be surprised to learn that their normal day-to-day activities and interactions with employees may also present them with unintended risks.

Lawsuits derived from employee-related accusations are a common occurrence. These allegations can range from discrimination and wrongful termination to failure to hire or promote. In 2009 alone, the Equal Employment Opportunity Commission (EEOC) received more than 93,000 charges, up 13% from 2007*. Employment Practices Liability Insurance (EPLI) protects an organization against lawsuits or claims filed by employees, former employees and prospective employees. EPLI coverage is a standard component in many nonprofit Directors & Officers (D&O) Liability insurance policies in the marketplace.

Associations are unique in that the very nature of their operations— “competitors” joined together to achieve a shared goal of advancing an industry or profession— lends itself to possible allegations of antitrust law violations. Some association actions, such as membership restrictions and the setting of standards or certification of members, increase an association’s exposure.

The following claim scenarios exemplify why having the proper Directors & Officers (D&O) Liability Insurance (D&O) is so important. These are anonymous, composite examples of claims. In short, they could happen to you and your association.

Claim Scenario #1

A charge was filed with the Equal Employment Opportunity Commission by the controller of a nonprofit entity based on national origin discrimination. The claimant is later fired based on insubordination while an investigation was being conducted by outside grantor-agencies. The claimant then files a lawsuit including claims for discrimination, retaliation and is seeking “whistle-blower” protection for allegedly cooperating with the outside investigators.

The claimant was bitter and refused to negotiate a reasonable settlement. The court permitted him liberal discovery of all the insured’s computer records and documents while he conducted a “fishing expedition” seeking to support his claims. The matter proceeded to trial and ultimately settled while on appeal after costing over \$1M in legal fees and settlement, not to mention the distraction and time involved for the insureds’ personnel to work with defense counsel, attend depositions and testify at trial.

In this case seeking legal counsel prior to terminating the employee may have mitigated some of the cost associated with this claim.



Claim Scenario #2

An office manager for a nonprofit organization has a consensual romance with a subordinate employee. The relationship sours and the employee's performance fails to meet set standards. When the manager fires the employee for poor performance, the employee makes a claim for sexual harassment and retaliation and alleges that she consented to the romance because she feared she would lose her job if she didn't. The case became one of "he said, she said" and was difficult to defend particularly in such a highly emotional situation.

Best practices should be employed including sensitivity and harassment training for all employees. Office romances should be discouraged and transfers offered if one employee is supervising another. This type of claim can cost hundreds of thousands to settle and depending on the jurisdiction, insureds may be responsible for all or a portion of the settlement because some risks may be deemed uninsurable (for example punitive damages)

Claim Scenario #3

An employee reports that he has been diagnosed with cancer and requires surgery and treatment and will be out of office for a period of time. When the employee sought to return to work, the employer did not fully engage in the interactive process of seeking to accommodate this person's disability and decided to keep the temporary replacement that was doing a good job. The employee with cancer was terminated and filed a charge alleging disability discrimination. The nonprofit employer is now facing defense against a very sympathetic claimant whom the jury might favor. Depending on the salary level of the employee/cancer victim, back pay and time to find a comparable job in the current economy could lead to a claim worth multiples of the employee's annual salary.

In the future, the insured should have a knowledgeable Human Resources manager involved in the employee's return for a certain period of time. This may have helped to prevent this set of circumstances.

Claim Scenario #4

The claimant was a company that was seeking membership in a nonprofit trade association. The claimant alleges members of the association sought to block the company's entrance to the marketplace and alleges various anti-trust violations. Defense counsel for anti-trust cases charge a very expensive rate due to the complexity of anti-trust laws. The claim costs hundreds of thousands in defense cost but was ultimately dismissed. Even though defense was successful at a relatively early stage in the litigation, the matter was very expensive.

These claim scenarios provide a peek into the potential minefield within which your association operates. It is important that your organization is properly prepared for the exposures it faces. In addition to reviewing and updating your employee manual, educating your employees on policies and procedures and establishing antitrust policy guidelines, it is prudent to explore insurance to ensure your organization is properly protected.

The scenarios summarized herein are offered only as examples. Coverage depends on the actual facts of each case and the terms, conditions and exclusions of each individual policy. Please refer to the policy to determine all terms, conditions, exclusions, and limitations of coverage.

**US Equal Employment Opportunity Commission, Charge Statistics, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>*