

Protect your firm from litigation

Strategic management and specialized insurance are key for design firms seeking to address expanding employment-related risks.



Jared Maxwell,
Assistant Vice
President,
Ames & Gough.

Despite efforts by design firms and other employers across the country to comply with anti-discrimination laws and Equal Employment Opportunity Commission regulations, employment-related lawsuits are rising. In 2014, the EEOC received more than 88,000 employment-related complaints.

For design firms of all sizes, the costs of employment actions can be substantial: Expenses associated with these lawsuits typically exceed \$250,000 in judgment costs and attorney's fees, in addition to negative effects on employee morale, productivity, reputation, and recruitment.

Managing this risk often involves a two-pronged approach of adopting sound risk-management practices to reduce the likelihood of employment-related claims, while purchasing employment practices liability insurance to protect against the financial consequence of any claims that do arise.

“(Employment practices liability insurance) can protect insured employers against claims brought by employees or potential employees alleging wrongful termination, harassment, defamation, discrimination, emotional distress, privacy violations, and related causes of action.”

Risk management helps prevent claims. An effective employment practices risk-management program can prevent claims while helping establish a defense when an employment-related claim occurs. These programs typically involve:

- **Creation of an employment manual.** The manual should articulate clear and consistent policies and procedures, including any process for reporting situations involving discrimination or harassment. Review the manual with all current and new employees and require them to sign an acknowledgement letter that they have read the manual and agree to follow the firm's policies and procedures. Hold occasional meetings with employees to reinforce your employment policies.

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- **Training and development.** All managers and supervisors with hiring responsibilities should receive training, so they understand and follow your firm's protocols and comply with all relevant employment laws.
- **Attorney review.** Have an attorney check all recruitment advertisements, employment applications, job tests, employment contracts, and employee manual acknowledgement letters to ensure they comply with federal and state employment laws in your jurisdiction.
- **“Zero tolerance” policy.** Establish a written policy of “zero tolerance” against sexual harassment and discrimination of all types – race, sex, age, national origin, religion, disability, etc. Your employee manual should include behavioral guidelines, reporting procedures, and disciplinary procedures – up to and including termination.

Prominently publish the firm's equal opportunity employment policies. This shows your firm will not tolerate any kind of discrimination or harassment.

Establish confidential internal complaint procedures. Any employee who is potentially subjected to discrimination, sexual harassment, or other alleged inappropriate behavior, must know how to file a confidential complaint. Establish a formal process designating a higher-level manager (other than an immediate supervisor) or HR professional to whom complaints should be directed and communicate the process to all employees.

Investigate all charges of discrimination or sexual

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harassment. Failure to do this can lead to lawsuits, brought by both the accused employee for defamation and by the complainant for failure to properly evaluate the complaint.

- **Check classification of employees.** All employees should be properly classified as either exempt or nonexempt to avoid wage and hour claims, the fastest growing source of employment litigation. While the Fair Labor Standards Act has exemptions from overtime pay requirements for executives, administrative, and professional employees, they don't automatically apply to salaried employees or those with professional degrees (such as engineers). You need to know if and how exemptions apply to your firm's employees.

INSURANCE CAN PROTECT ASSETS. EPLI can protect insured employers against claims brought by employees or potential employees alleging wrongful termination, harassment, defamation, discrimination, emotional distress, privacy violations, and related causes of action.

This insurance is available as a stand-alone policy or combined with other management liability insurance coverages, such as directors and officers or fiduciary liability. In some cases, it's also available as a sublimit under a business owner's or A/E professional liability policy.

EPLI policies differ widely. For instance, some have a broader definition of a claim, such as actions seeking any type of relief whether monetary or nonmonetary, while others may be limited to demands for monetary damages.

The policies also vary in their definition of "insured." Some extend coverage to temporary and seasonal employees, volunteers, interns, or independent contractors.

Here are some standard coverages under EPLI policies and related considerations:

- **"Duty to defend" or "duty to pay."** This clause determines whether your firm or the insurer assumes control of the entire claim defense process, including selecting counsel and payment of legal bills. Policies with "duty to pay" clauses only require the insurer to reimburse the insured for its expenditures in defending a claim. Generally, smaller firms opt for the "duty to defend" clause, which can have cash-flow advantages, in addition to the benefit of the insurer's wider experience in engaging and managing counsel.
- **Selection of counsel.** Some policies allow the insureds to have input in the selection of counsel, including the ability to choose counsel to represent them from the insurer's panel of pre-approved defense attorneys.
- **Consent to settle.** This provision may enable an insurer to limit its claim payment to no more than the amount for which it could otherwise have settled the lawsuit plus defense costs – even if the insured does not consent to such a settlement.
- **Third-party liability.** This covers suits brought against the insured firm by third parties, such as vendors or customers, but may have restrictions and coverage limitations.
- **Determining limits.** While the amount of coverage to purchase often depends on several factors, most A/E firms purchase stand-alone EPLI limits of \$1 million- \$5 million. When this coverage is purchased as part of another insurance policy, such as a professional liability or management liability policy, any employment claim could erode coverage for other risks. Thus, firms with such coverage arrangements may need to purchase higher limits.

The frequency and severity of employment litigation is higher today than ever. By working with a knowledgeable insurance professional to adopt sound risk-management practices and purchase an EPLI policy, A/E firm leaders can reduce the likelihood of employment-related claims, limit their exposure from losses, and strengthen their firms in the process. ▀

JARED MAXWELL is an assistant vice president at [Ames & Gough](#).