ANALYSIS

Use of panel counsel to limit legal expenses can cost EPL carriers

The increased use of pre-approved law firms by insurers can limit their flexibility to mitigate potential employment liability risks, which can prove far more expensive in the long run

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The rise in employment practices liability (EPL) defence costs in the US in recent years has become a particular challenge for insurers. More recently, however, the situation has been exacerbated by the Harvey Weinstein scandal and the resultant pressure on US law makers to abolish the culture of silence surrounding sexual harassment by making it easier for victims to pursue claims against their harassers and/or employers.

So much so, many EPL insurers now require insureds to pick a law firm from a panel of pre-approved firms, whose pre-negotiated rates with the insurer are generally lower than market attorney rates.

Indeed, the rise in defence costs is one of the most frequently cited reasons for insurers revising retention levels under EPL policies.

According to the Hiscox Guide to Employee Lawsuits, at the end of 2015 the average cost for a claim that resulted in defence and settlement payments was $125,000. By the end of 2017 that cost had gone up to $160,000. The fear is that as a result of the "Weinstein effect" those costs will increase even more substantially in 2018.

The sense among brokers spoken to by *Insurance Day* is these days most EPL insurers in the US either require or recommend the use of panel counsel. Many EPL policies are duty to defend policy forms, which gives the insurer the ability to choose defense counsel, with the insured's consent.

For example, broker Gallagher recommends insurers let it know if they have a law firm they prefer to use for EPL litigation before coverage is bound, to enable Gallagher to negotiate pre-approval of a non-panel firm before a claim is filed. "Even if the insurer agrees to a non-panel firm, it will usually cap the rate it will reimburse to the same amount it would have paid a panel firm, leaving the difference between the amount insurance pays and the amount the firm charges to be paid by the insured," Emily Loupee, senior vice-president in the management liability practice at Gallagher, says.

Lawyers say panel counsel have been used in the EPL arena (although not by all insurers) well before the Weinstein scandal broke last year. Whether panel counsel are required or not depends a lot on the type of policy issued and on the market that issues that policy, according to Jennifer Quinn Broda, partner at Kennedys CMK in Chicago. For example, the Bermuda market, which traditionally has not required panel counsel to be retained to defend an EPL claim, has not changed its practices on this front. And, as far as Broda is aware, there is no suggestion of plans by the Bermuda market to do so as a result of the Weinstein scandal or the #MeToo movement.

$125,000
Average cost in 2015 for a claim resulting in defence and settlement payments

$160,000
Average cost for a claim resulting in defence and settlement payments by the end of 2017

But while many carriers rely on pre-approved firms, others are taking a different approach as a way of differentiating themselves in a highly challenging, but still very competitive, marketplace.

Lloyd's insurer Beazley, which has been writing primary and monoline EPL in the US since 2001, takes a more flexible approach. If an insured has an existing relationship with a reputable employment law firm, Beazley is generally happy to consider it, Wayne Imrie, underwriter for management liability, specialty lines at Beazley, says. Beazley offers insureds risk management advice at no additional cost as a way of mitigating the risk, as well as containing expenses around claims. The service includes a hotline to help companies resolve potential employment-related issues.

Other carriers that have similarly opted not to go down the pre-approved law firm route have increased retentions or decided to avoid writing certain industries that may have a higher exposure.

In the view of some lawyers, the use of panel counsel by insurers can divert attention from the active management of employment liability issues in the workplace. In particular, they say, employers and their insurers need to be proactive and regularly consult with employment lawyers (which might not be on the approved panel) with specific expertise in their state, city or municipality, as laws can vary greatly across these entities. "Having an employment lawyer on retainer that provides training, updates policies and keeps you abreast of legal developments will help with losses," Caroline Berdzik, a partner at Goldberg Segalla, says.

The impact of the Weinstein scandal and the #MeToo movement on EPL insurance claims costs is by no means clear, according to Broda at Kennedys CMK. She points out there is now real pressure on boards of directors to make sure the proper policies and procedures are in place to handle these issues because directors themselves have become the focus of claims for their failure to properly oversee their respective companies.

In this regard, underwriters can act as the first line of defence by ensuring the companies to which they provide this coverage to take sexual harassment claims seriously and have proper procedures in place to investigate and respond to such claims in a way that limits their exposure should such claims have merit.

"Sexual harassment claims have always been a part of the exposures presented under an EPL policy and if you are a company that has sound employment practices and takes sexual harassment claims seriously, the exposure is not necessarily going to increase just because people are more willing to come forward and make a claim," Broda says. ■

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Women march against sexual assault and harassment at a #MeToo march in Los Angeles in November last year