

Sexual Harassment

Is your company exposed?

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Explosive allegations of sexual harassment against high-profile individuals and executives in both the public and private sector are dominating the news. Accusers and whistle-blowers are increasingly willing to speak publicly. These sexual harassment claims present a clear danger to a company's public image, goodwill and brand.

The good news is this risk is typically covered under an employment practices liability insurance (EPLI) policy or a hybrid private company directors and officers' liability (D&O)/EPLI policy, though the scope and breadth of coverage may vary considerably from policy to policy. However, as with any claim, the specific factual circumstances surrounding the matter will be critical to determining whether coverage is ultimately triggered under any such policy or not.

What is "sexual harassment"?

As we are inundated with press reports of sexual harassment allegations, it is easy to forget that sexual harassment has a precise legal definition, and that not all bad conduct in the workplace meets that definition.

MARIE-FRANCE GELOT

Senior Vice President
Insurance and Claims Counsel
646.477.4601
mgelot@lockton.com



According to the Equal Employment Opportunity Commission (EEOC), sexual harassment includes “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when this conduct explicitly or implicitly affects an individual’s employment, unreasonably interferes with an individual’s work performance, or creates an intimidating, hostile, or offensive work environment.” It is also unlawful to retaliate against an individual who has alleged or reported sexual harassment, or who has filed a formal discrimination charge or lawsuit under Title VII of the federal Civil Rights Act.

Whether or not a claimant is able to actually make a case proving that sexual harassment occurred, the reality is that the bulk of liability faced by companies accused of such conduct is not generated after a jury trial. It is generated by attorneys’ fees in litigation, win or lose. In the current environment, this is a critical point; any perceived harassment can result in six-figure liability for a company, regardless of whether a judge or jury would ultimately find the harassment unlawful.

Legal procedures

In order to bring a claim for sexual harassment under Title VII:



Laws protecting workers from sexual harassment

In 1964, Congress passed Title VII of the Civil Rights Act, making it unlawful for employers with 15 or more employees to discriminate against individuals in making employment decisions on the basis of several protected characteristics, including sex. All US states have similar laws, most with a lower employee threshold.

Sexual harassment is not prohibited as such by Title VII. However, in the 1980s, the EEOC, the federal agency charged with enforcing anti-discrimination laws, and eventually the Supreme Court, recognized that “severe” and “pervasive” mistreatment because of sex (that is, sexual harassment) could be bad enough that it was just like any other specific adverse employment action.

EPLI coverage of harassment claims

In light of the current spotlight on sexual harassment, an influx of these claims is expected in the coming months. Consequently, there is significant concern about the scope and extent of insurance coverage that a company and individual insureds have to cover such claims.

EPLI policies provide coverage for companies and their employees, inclusive of directors, officers and senior management, for claims brought by past, present or future employees alleging wrongful employment acts and decisions, which include sexual or other workplace harassment, including quid pro quo and hostile work environment.

Many, but not all, EPLI policies also extend coverage to claims brought by third parties, such as clients, customers or vendors of a company, who allege discrimination or sexual harassment.

Example: A customer of a retail chain alleges that he or she was sexually harassed by a store employee while in the store and that he or she suffered damages. This would likely constitute a covered claim under the company’s EPLI policy, assuming that policy included third-party coverage. Such a policy would provide defense costs coverage and indemnity coverage, subject to any policy limitations or exclusions which might apply to the specific facts of that case, for both the company and the employee against whom the harassment is alleged.



Source: EEOC’s Select Task Force on the Study of Harassment in the Workplace, June 2016.

For coverage to trigger under an EPLI policy, the sexual harassment must have occurred while the employee was acting in the course and scope of his or her employment.

Example: An employee alleges that her manager sexually harassed her in a bar on a Saturday evening during a social event. The insurance carrier would undoubtedly question whether the manager was “on the job” during the social event to determine whether coverage applied. If the wrongful conduct was found to have occurred outside of the course and scope of employment, the EPLI policy would not cover the claim.

The specific language and breadth of coverage for sexual harassment in EPLI policies will vary between insurers. While all policies today contain some basic form of sexual harassment coverage, many policies draw a line between sexual harassment and physical acts that rise to the level of a rape.

Frequent exclusions

Most EPLI policies contain an exclusion for bodily injury that precludes coverage for exactly that — any claim for actual or alleged bodily injury. Broader versions of the exclusion will also include assault and battery. Because the common law definition of battery essentially means an unwanted or unpermitted touching, this basically limits sexual harassment coverage to nonphysical sexual harassment only, even if that is not explicitly stated in the policy wording. However, EPLI policies that do exclude bodily injury typically contain an exception for claims alleging emotional distress, mental anguish and humiliation.

While most carriers would undoubtedly seek to deny coverage for a claim of rape under the exclusion, a claim for rape that also includes emotional distress allegations may be partially covered, creating potentially complicated issues around the allocation of covered versus uncovered defense costs and indemnity for the insured. For policies that do not contain any such bodily injury exclusion, the line between coverage for sexual harassment versus rape could become blurry.

Another exclusion commonly found in D&O and EPLI policies that could bar coverage for rape is what is referred to as the “conduct exclusion,” which precludes coverage for intentional or deliberate fraudulent or criminal acts. While this type of exclusion appears highly relevant to a claim alleging rape, it typically applies only if there is a final judgment by a court that establishes the excluded conduct took place. In highly sensitive matters involving sexual harassment and rape, companies often settle quickly in order to avoid negative publicity. Because settled cases are never adjudicated in a court of law, this exclusion seldom applies.

Some EPLI policies include specific exclusions which narrow the scope of covered sexual harassment. These exclusions draw a clear distinction between behavior that is insurable versus behavior that is so egregious that to insure it would be offensive to — if not outright against — public policy. Such exclusions may apply to “licentious, immoral or sexual behavior,” “sexual abuse or injury,” “sexual exploitation,” “sexual assault or molestation intended to lead to or culminating in any sexual act,” and “child abuse or neglect.” Broad exclusions like those will often include a catch-all bucket for any “issues related to the employment, supervision,



reporting or failure to report to the proper authorities, or retention of any person committing the acts described above.” Depending on the specific facts of the claim, wording like this could effectively eliminate coverage for any claim against or involving an individual who physically harasses someone.

Some carriers have recently narrowed the scope of coverage for sexual harassment; others continue to sharpen the policy language to reflect modern-day reality by explicitly confirming that coverage for sexual harassment applies even where the work-related harassment occurs via electronic means, such as email, instant messaging, social networking services or blogs.

How does vicarious liability impact coverage?

A company may be held responsible for the bad acts of its employees under the theory of vicarious liability. If an employee is accused of sexual harassment, typical claims against a company may include negligent hiring, negligent retention or negligent supervision of the employee. Sexual harassment claims brought against

both the company and an employee against whom sexual harassment or even rape is alleged can raise interesting issues when the company and its employee’s interests are not aligned.

In such cases, the company could take the position that the employee was acting outside of the course and scope of his employment or committed an act that rises to a criminal level. Thus, they could decide to withhold indemnification of legal costs and any settlement or judgment incurred by the “black hat” employee in connection with the claim.

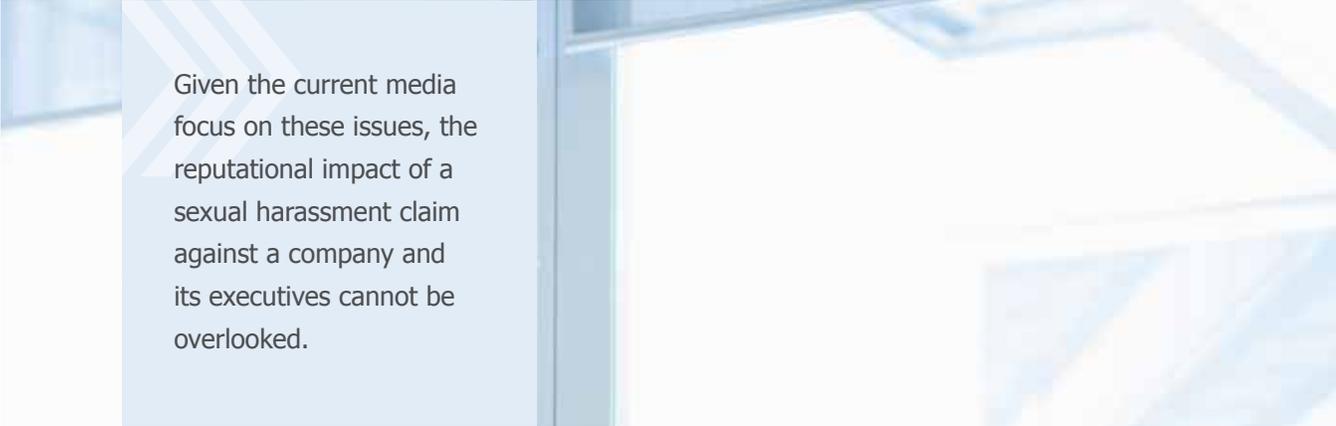
While most states require employers to defend and indemnify their employees, many states stop short of requiring employers to indemnify a sexual harasser, even if the acts occurred on the employer’s premises. The reasoning is that requests for sexual favors and inappropriate sexual contact are motivated by strictly personal reasons unrelated to the performance of the employee’s job. Sexual harassment is therefore found to be conduct outside the scope of employment.



From an insurance perspective, the issue of corporate indemnification of an employee determines whether a retention applies to the claim. D&O policies typically draw a clear distinction between insured individuals who are being indemnified by the insured entity and are subject to a retention amount and those who are not being indemnified and not responsible to pay any retention. Conversely, EPLI policies require the retention to be paid regardless of whether individual employees are indemnified. Under an EPLI policy, absent evidence of the company's financial insolvency, the insurer may continue to request that the company pay the retention amount even where it is not indemnifying the individual. This can be particularly problematic where a policy's retention is high. In such cases, a carrier may be open to creative solutions to address the problem.

Other considerations

Situations where the company is at odds with its accused employee following a sexual harassment claim can be tricky. On the one hand, employees are insureds under the policy and technically entitled to policy proceeds for claims brought against them. A policyholder cannot withhold access to its EPLI policy from an employee potentially covered under such policy. On the other hand, the company is the named insured and any claims paid by the insurer will impact the company directly through potential premium increases or coverage restrictions. Moreover, depending on the amount of policy limits, a large sexual harassment claim could burn through the entire policy, leaving no insurance for other claims made against the company and insured individuals within the same policy period. Such a situation can create tremendous frustration for the company and difficult waters to navigate for the carrier. The broker's role in such situations is critical to assuring that the claim stays on the rails and that the communication channels remain open among the parties.



Given the current media focus on these issues, the reputational impact of a sexual harassment claim against a company and its executives cannot be overlooked.

Additionally, it is important to note that carriers who have made a claim payment on a sexual harassment claim involving egregious facts are highly likely to seek an exclusion at renewal for any and all future claims of sexual harassment involving the alleged insured harasser. Assuming the employee remains employed with the company, such exclusionary wording must be carefully reviewed by the broker. This review can ensure that it is as narrow to the issue as possible and does not overreach to potentially exclude other claims unrelated to sexual harassment in the future.

Given the current media focus on these issues, the reputational impact of a sexual harassment claim against a company and its executives cannot be overlooked. Some policies contain specific coverage for crisis management, which would cover costs a company incurs to retain a public relations firm to minimize reputational damage resulting from a high-profile claim or event. Such coverage remains fairly rare in the EPLI space and is typically subject to a sublimit amount, well below the policy limit.

It remains to be seen if EPLI insurers will react to the momentous changes occurring in the national conversation on sexual harassment in the workplace by limiting the scope of the coverage or making it more expensive. For now, corporations that purchase EPLI coverage can rest assured that their policies should provide some level of protection should they face a sexual harassment claim in the future.

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