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# Employment Practices Liability Exposure for Long Term Care Providers

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## The Exposure

Employment Practices Liability has become one of the leading exposures that threaten nursing homes, assisted living facilities, home health care agencies and other long term care providers. The long term care industry suffers from a relatively high incidence of Employment Practices Liability (EPL) claims. There are several underlying factors which contribute to this phenomenon.

One reason for the high rate of claims is the high employee turnover<sup>1</sup> associated with many healthcare providers. Occupations with a high proportion of young and part-time workers, such as practical nursing, psychiatric, and home health aides, are usually low paying, have poor benefits, and minimal training

result in summary termination for poorly performing caregivers. The point at which an employee's job status changes, is the most likely time for the friction and misunderstandings that can lead to legal action by an unhappy employee or former employee.

The bleak job environment, especially for young and/or relatively uneducated workers, often leaves legitimately terminated employees desperate for money. This desperation might prompt a terminated employee to explore their options with a labor law attorney. The high cost of defending against EPL claims leads to increased settlement amounts and, as a consequence, an increase in marketing by plaintiff oriented employment practices attorneys.

## Solutions:

### High-Level Risk Management Overview

To mitigate the threat described above, long term care executives must fit EPL risk management into the long list of important items that require attention (and budget allocation). Developing internal expertise in this area through training existing staff and/or hiring qualified HR professionals is an important first step in managing EPL risks. Alternatively, it is helpful to secure the services of external business partners that can/will provide effective EPL advice, support and

### EPL Risk Management Action Items:

- Develop Internal Expertise and Controls
- Partner with the Right Vendors
- Secure EPL Insurance

services. Potential business partners include: HR Attorneys; HR Consulting Firms; and Risk Management Professionals. Access to expertise is not sufficient. LTC providers must continually develop, implement and improve EPL controls; New hire screening and termination procedures for instance. Lastly, facilities should strongly consider securing Management Liability Insurance that includes Directors and Officers (D&O) coverage; Employment Practices Liability Insurance (EPLI) and Third Party Discrimination Liability coverage. Although, EPLI deductibles can be high, EPLI coverage creates a loss ceiling that allows a long-term care provider to much more aggressively fight frivolous claims and to be more aggressive in settlement discussions. Additionally, EPLI insurance providers often offer helpful resources for reducing/managing pre-loss EPL exposure and provide cost effective claims management and legal services after a claim or incident has occurred.

### Factors Leading to LTC EPL Claims:

- High Employee Turnover
- Flat Management Structure
- Regulatory Scrutiny
- Bleak Job Environment for Terminated Staff
- Increased Marketing by Plaintiff Oriented Labor Attorneys

requirements. The flat management structure in long term care settings and government enforced patient care standards frequently

# Sample EPLI Claims

- A female dietary employee filed a suit alleging hostile work environment at a Los Angeles California skilled nursing facility. The plaintiff, who is from Honduras, was harassed by two male coworkers from Mexico. The male coworkers solicited a sexual relationship from the new female employee by asserting their belief that women from Honduras are generally promiscuous. The male employees made kissing gestures directed at the female employee on several occasions. The female employee complained to the facilities contracted Dietitian who reported the issue to the facility. The facility did a thorough investigation, reprimanded the offending coworkers, and conducted mandatory sexual harassment training for all staff. There were no further issues related to this incident but after the employee was terminated, 6 months later, for poor attendance and work quality, she secured the services of an attorney and filed suit. The facility, which had EPLI insurance, settled for \$20,000 after accruing \$14,000 in defense costs.
- On behalf of five natives of Cuba and Puerto Rico, the EEOC filed suit against a New York hospital. The suit claimed that the hospital discriminated against its Hispanic housekeepers by subjecting them to rules that required them to speak only English while in the hospital. The hospital did not admit to any discrimination but did agree to a \$200,000 settlement.
- In a New York whistleblower case, two executives of Metropolitan Hospital claimed that they were wrongfully terminated from their jobs in retaliation for failing to participate in Medicaid/Medicare fraud. An affiliation contract between New York City government and Metropolitan Hospital provided that New York Medical College would supply doctors to the hospital in return for an annual payment of \$25,000,000. Plaintiffs testified that they discovered that Metropolitan Hospital had overpaid New York Medical College for the actual number of doctors that they were provided. Plaintiffs demanded that the money be refunded to the government. Plaintiffs claimed that they reported the overpayment to top Hospital personnel, but the Hospital failed to take any action to correct it. The jury awarded \$7.5 million to the plaintiffs, with \$400,000 in punitive damages. The case later settled for \$4.9 million. This case involved regulatory legal issues that would be covered by some Directors & Officers Liability Insurance policies.
- A 56-year old nurse filed a lawsuit against Staten Island University Hospital, alleging that she was terminated because of a work-related herniated disc that prevented her from heavy lifting, bending and stretching. She claimed that notwithstanding the injury she was still able to perform the essential functions of her job. The jury awarded the plaintiff approximately \$60.3 million.
- The EEOC filed suit against an Oklahoma nursing home on behalf of a kitchen worker for perceived disability discrimination. The worker confided to the home's nursing director that she had been diagnosed with hepatitis C. Five days later, the worker was terminated based on allegations that she lied on her job application. The claimed falsehood involved a question about whether she was under a doctor's care, to which she answered "no," since her disease was in remission. The worker alleged that the nursing director told her that she couldn't work in the kitchen due to her diagnosis because there would be a "mass exodus" from the nursing home if the residents found out. A jury found defendant liable and awarded \$50,000 to Plaintiff. The extent of the substantial legal costs incurred by the defendant are not publically available.

## Sample Third Party Discrimination Claim

- A long- term residential care facility had a policy that required residents in wheelchairs to transfer to ordinary chairs when taking their meals in the dining room. A certain resident was able to transfer independently from his wheelchair to a regular chair, but due to the progression of ALS disease, this became impossible. The resident was allowed for a time to sit in his wheelchair at a table by himself in the dining room. He was later told that his one- year contract would not be renewed because he could no longer make the transfer from his wheelchair to a regular chair at mealtimes. The resident's family filed a lawsuit against the facility to contest its transfer policy. The court ruled that the state's fair housing law requires reasonable accommodation to the needs of disabled individuals to allow them equal opportunity for access to the use and enjoyment of a residential care setting. The Colorado Court of appeals subsequently affirmed this decision.



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## About the Author

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