

Cray • Huber

Labor and Employment Law Notes

EPLI Policy Notice Triggers and Recent Noteworthy Employment Law Decisions

A. The Clock is Ticking: EEOC Proceedings May Trigger the Notice Obligation or Reporting Requirement in EPLI Policies

A recent trend of decisions nationwide reveals that an insured who learns that it is the subject of an Equal Employment Opportunity Commission (“EEOC”) (or comparable governmental entity) investigation may be required to promptly put their employment practices liability insurance carrier on notice. The failure to do so may lead to a harsh result, including the denial of coverage.

While few Employment Practices Liability (“EPL”) insurance policies/endorsements define a “claim” in terms of an EEOC proceeding, charge, and/or investigation, most policies do not utilize that level of specificity. Nevertheless, federal district courts in Louisiana (Williams v. Synergy Care, Inc., 2008 WL 2945918 (W.D. La. July 29, 2008)) and Texas (Munsch Hardt Kopf & Harr P.C. v. Executive Risk Specialty Insurance Co., 2007 WL 708851 (N.D. Tex. March 8, 2007)), recently considered whether an insured’s obligation to notify its insurer of a “claim” or “suit” is triggered by an EEOC proceeding even though the policy does not expressly define a “claim” in such terms, or whether an insured may wait until it faces a civil lawsuit before notifying its insurer. In interpreting the language of the applicable policies, the courts concluded that EEOC proceedings do, in fact, trigger the insured’s notification or reporting requirement. The Texas court also found that an EEOC charge and a civil complaint stemming from the same set of facts are “related claims” and consequently, must be treated as a single claim. Although a South Dakota case (Lodgenet Entertainment Corp. v. American International Specialty Lines Insurance Co., 299 F. Supp. 2d 987 (2003)), stands for the proposition that an EEOC charge and a civil complaint may constitute multiple claims, the fact that this decision has not been cited with approval in five years suggests that it is not guiding precedent for other courts nationwide. Thus, the filing of a civil complaint subsequent to an EEOC investigation should not restart the notice or reporting clock.

While these decisions involve the construction of claims-made policies, their precedential effect may also loom over and influence occurrence-based policies. Since many states find an unreasonable delay in notifying one’s insurer to be a breach of the policy, insureds should make sure to promptly notify their carriers of EEOC and other administrative agency investigations and proceedings. Those who handle EPLI matters should familiarize themselves with this trend.

B. Recent Employment Law-Related Decisions and the United States Supreme Court's Docket of Employment-Related Cases

1. RECENT NOTEWORTHY EMPLOYMENT-RELATED DECISIONS

Employers and their insurers may be forced to fight a case on two fronts simultaneously. A recent Ninth Circuit Court of Appeals decision held that the United States Equal Employment Opportunity Commission is allowed to investigate charges of discrimination even after the complaining employee files a private lawsuit against the accused employer in a case involving Federal Express Corporation. The Ninth Circuit ruling takes issue with a prior Fifth Circuit decision and opens a circuit split on the question. Typically, when the EEOC receives a complaint of employment discrimination that it believes is worth pursuing, the agency will either sue the employer or issue the complainant a right-to-sue letter authorizing the individual to file a private action. When the EEOC issues a right-to-sue letter it typically ends its own investigation, but it is lawfully entitled to continue to pursue the matter, according to the Ninth Circuit Court of Appeals in rejecting Federal Express' position that the EEOC is divested of investigative authority after a private action is filed. The Ninth Circuit held that a private party does not divest the EEOC of its authority. "As the Supreme Court recognized, the EEOC controls the charge regardless of what the charging party decides to do." The significance of this ruling on employers and the EPLI carriers is that depending on the terms of the policy or endorsement, the insured employer may end up fighting a battle on two fronts, one with the employer in court and another with the EEOC in the context of its continuing investigation.

Employer violated ERISA plan contained in CBA. In a suit under ERISA and the Taft-Hartley Act alleging that the defendants violated the provisions of an ERISA plan contained in a collective bargaining agreement ("CBA"), the Seventh Circuit held summary judgment for the plaintiffs was affirmed where: 1) the contract was clear on its face as to the percentage of plaintiffs' health insurance premiums the employer was to pay, and subsequent modifications to the CBA were not evidence of a latent ambiguity in the agreement; 2) the principle that contracts can be modified by the subsequent conduct of the parties is inapplicable to ERISA plans unless the conduct is proved by a writing; and 3) the award of attorneys' fees in an amount greater than the remedial award was proper.

Union's claim for failure to reinstate is rejected. The Seventh Circuit rejected United Steel, Paper and Forestry union's petition for rehearing of a national labor relations board determination that an employer did not violate federal labor law by refusing to reinstate economic strikers because all of its replacement workers were permanent employees. Jones Plastics had a "mutual understanding of permanence" with the replacement workers, and the company's refusal to reinstate economic strikers could be considered a "legitimate and substance business justification."

Repeated denials of opportunities to qualify for annual pay raise fresh violations. The Seventh Circuit Court of Appeals ruled that an employee can timely file his EEOC charge for a Title VII claim that he denied opportunities to qualify for annual pay raises.

An employer's repeated discriminatory acts of denying an employee the opportunity to visit customers, which in turn precluded him from receiving yearly pay raises as a quality control inspector that were given to all other inspectors, were materially adverse employment actions, under Title VII, for which the employer timely filed an EEOC charge within 300 days of the employers' actions. The employee was denied the raise every year for failing to meet the prerequisite due to the employers alleged preventative efforts. Every decision by the employer not to give the raises based on the prerequisite gave rise to a fresh violation.

Insufficient evidence of retaliatory discharge. The Seventh Circuit Court of Appeals held that the district court did not err in granting the defendant-employers' motion for summary judgment in an action alleging that the defendant terminated the employee in retaliation for informing her supervisor that she intended to file an EEOC sex discrimination charge. The plaintiff failed to present sufficient evidence outside of a six-week gap between the stated intention of filing the EEOC charge and her termination to establish prima facie retaliation claim. Also, the plaintiffs proposed comparables lacked similar disciplinary history and/or similar supervisor to support a retaliation claim. Finally, the plaintiff otherwise failed to dispute the defendant's contention that she was actually terminated for insubordination and for losing a disk containing confidential information.

Mount Morris Illinois did not violate the National Labor Relations Act ("Act"). The National Relations Board, reversing the administrative law judge, found that respondent Quebecor World Mt. Morris II LLC did not violate certain sections of the Act by unilaterally implementing a "performance improvement plan" (PIP) procedure, and by demoting a bargaining-unit employee pursuant to a PIP. The board affirmed the judges finding that Quebecor did violate certain sections of the Act by refusing to provide relevant information requested by the union in the course of processing the grievance over the PIP procedure. The board, however, decided that the judge erred in finding it effective the contractual party's oral agreement to extend their expiring collective bargaining-agreement while they negotiated a successor contract. The board concluded that the oral agreement was valid, and that the extended collective bargaining contract was in effect at all relevant times. Consequently, the board decided that Quebecor is unilateral implementation of the PIP process, and its application to the employee, were clearly and unmistakably permitted under the contracts management-rights clause.

Plaintiff not entitled to damages or attorneys' fees despite employee violation of the Family and Medical Leave Act. In a suit alleging violations of the Family Medical Leave Act ("FMLA"), breach of contract and retaliation, the judgment that plaintiff was not entitled to damages or attorneys fees was affirmed by the Seventh Circuit where: 1) while defendant had violated the FMLA, plaintiff failed to prove that he would have been able to return to work or he had attempted to mitigate his damages; and 2) FMLA's required award of attorneys fees to prevailing plaintiffs did not apply since, despite the jury verdict for the plaintiff on the liability issue, the final judgment was correctly entered for defendant.

Dispute over unilateral changes in retiring medical benefits is within scope of CBA. The Seventh Circuit held that a dispute over an employers unilateral changes in retiring medical benefits was within the scope of a collective bargaining agreement (CBA). Applying the presumption of arbitrability, an employer agreed in the CBA to arbitrate disputes brought by the local union on behalf of retirees. The arbitration provision was “quite broad,” the union rather than retirees filed that the grievance asserting a violation of the CBA and of Memoranda Agreement with respect to the retiree benefits, in the CBA contain no express provision excluding retiree grievances from the grievance and arbitration procedure.

Complaint filed within 90 days of second EEOC right-to-sue notice was timely where first notice rescinded. A race discrimination complaint that was filed within 90 days of the second notice of the right-to-sue issued by the EEOC was timely. The employee had originally filed the discrimination charge with the Illinois Department of Human Rights (“IDHR”), but was advised to file with the EEOC because the IDHR could not handle class action claims. The IDHR charge was supposed to be withdrawn in one manner so the IDHR would actively stop investigating it and transfer it to the EEOC for investigation, but due to the IDHR investigator’s erroneous paperwork it was withdrawn such that the EEOC issued a second notice of a right-to-sue. After the complainant explained he had not intended for the charge to be dismissed or for the notice of right-to-sue to issue, the EEOC district director rescinded right-to-sue and transferred the charge to one of its enforcements units. The complainant signature on the request for the notice of right-to-sue did not, as the employer argued, bind him by contract to the resulting first right-to-sue letter where the complainant was proceeding *pro se* and acted quickly to correct the mistake and, most importantly, he recently relied on the district director’s letter of rescission.

2. THE HIGH COURT’S DOCKET INCLUDES SEVERAL EMPLOYMENT-RELATED CASES

The United States Supreme Court’s new term began in October. It is scheduled to rule on three important employment-related cases involving retaliation claims (Title VII), pregnancy discrimination (Title VII) and age bias (ADEA). In a somewhat surprising trend, in the last term the Supreme Court, headed by Chief Justice John Roberts, tended to rule in favor of employees. These rulings seemed to contradict what many in the business community hoped would be a high court that would be more employer friendly. Although there were certain decisions that did favor the employer, Congress saw fit to amend the law, in particular the American with Disabilities Act, to overturn the Supreme Court’s ruling from the last term limiting the definition of disability under the Act. We will keep you advised in future newsletters on the outcome of these cases and the potential impact on employers and their insurers.