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5 Wage And Hour Suit Coverage Tips For Calif. Employers

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Law360, New York (January 30, 2017, 11:41 AM EST) --In recent years, numerous California employers have faced wage and hour class action lawsuits alleging violations of the California Labor Code. As these employers can attest, wage and hour litigation can be costly to defend and can subject employers to substantial exposure in the form of settlements and judgments. However, employers facing wage and hour lawsuits may not need to shoulder these expenses themselves. As a recent federal district court decision confirms, California employers often have strong grounds to look to their employment practices liability (EPL) and directors' and officers' liability insurers for a defense and indemnity against wage and hour class action lawsuits.

In Hanover Insurance Company v. Poway Academy of Hair Design Inc.,[1] a federal district court ruled that an EPL insurer owed its insureds a duty to defend a pending wage and hour lawsuit. Hanover had issued a pair of policies to entities that owned and operated a number of beauty colleges in San Diego, California. Both policies excluded coverage for claims alleging a violation of any state law "that governs wage, hour and payroll policies and practices."

In August 2014, the insured entities were sued by a putative class of beauty college students. The putative class members asserted various claims under the CLC, including a claim alleging violations of CLC section 2802, which governs an employer's obligation to reimburse reasonable business expenses incurred by its employees. When the insureds sought a defense and indemnity, Hanover filed a declaratory relief action contending that all of the claims in the underlying lawsuit fell within "wage and hour" exclusion.

The Hanover court disagreed, holding that the exclusion did not apply to the claim alleging violations of CLC section 2802. The court reasoned that section 2802 served multiple functions, some of which did not touch on wages paid or hours worked. The court also stressed that no California appellate court had considered whether section 2802 was a "wage and hour" law for purposes of an EPL insurance policy, making it "a real possibility that it is not excluded and therefore covered." The court was unmoved by the fact that section 2802 claims are often asserted along with undeniable "wage and hour" claims, finding that the mere "pairing of these claims" was not a sufficient basis to conclude that section 2802 is

a “wage and hour” statute. Because the section 2802 claim was outside the scope of the “wage and hour” exclusion, the court held that Hanover was obligated to defend the lawsuit in its entirety.

Hanover serves as a reminder that liability insurance policies can provide valuable coverage for the expenses associated with California wage and hour class action lawsuits. Below are some tips for California employers to consider when making claims for coverage and responding to adverse positions from their insurers.

Tip #1: Strive to comply with your policy’s notice requirements.

Most EPL and D&O policies are provided on a claims-made basis. Claims-made policies typically purport to require the insured to provide notice of a claim within a specified timeframe after learning of the claim. For instance, some EPL and D&O policies purport to require the insured to provide notice within 30 or 60 days of learning of a claim, whereas others require notice “as soon as practicable” during the policy period.

Because the failure to comply with notice requirements in claims-made policies can impair the pursuit of coverage, California employers should make every effort to provide formal notice within the timeframes specified in their policies.

Tip #2: Do not overlook potentially covered allegations in the underlying complaint.

EPL and D&O insurers often contend that their policies’ coverage grants do not apply to wage and hour lawsuits. In many cases, such arguments are unfounded.

Indeed, most EPL policies expressly cover alleged “employment-related misrepresentations,” “employment-related discrimination,” “failure to implement and enforce appropriate corporate policies and procedures,” “breach of implied contract,” and the like. Numerous courts in California and elsewhere have held that broad coverage grants of this sort encompass various claims and allegations typically asserted in wage and hour lawsuits.[2]

D&O policies likewise often include expansive coverage grants. For example, many D&O policies broadly cover claims for any “wrongful acts.” This phrase frequently is defined to include any alleged breach of duty, neglect, error or omission — any one of which arguably would encompass most allegations and claims asserted in wage and hour litigation.

Thus, wage and hour lawsuits often trigger coverage under EPL and D&O policies, meaning that insurers must provide a defense and indemnity unless they can prove an exclusion or other coverage limitation applies.

Tip #3: If your insurer relies on a policy exclusion to deny coverage, review the exclusion closely and hold your insurer to its burden of proof.

Although EPL and D&O policies typically exclude coverage for certain types of wage and hour claims, such exclusions are not always as broad as insurers suggest. Indeed, in many cases, insurers are wrong to rely on policy exclusions to deny coverage for wage and hour lawsuits.

Under California law, if there is even one potentially covered allegation or claim in a complaint, an insurer generally must fund a defense to the entire lawsuit — even if most of the allegations and causes of action are uncovered.[3] Therefore, if an insurer seeks to rely on a policy exclusion to deny its duty to defend, it must establish that the exclusion applies to every claim and allegation in the wage and hour complaint.[4] In many cases, liability insurers will be unable to meet their high burden of proof.

For instance, EPL and D&O policies often exclude coverage for claims under the federal Fair Labor Standards Act and "similar provisions" of state law. Although such exclusions might bar coverage for certain claims under the CLC, California courts have recognized that some provisions of the CLC have no "similar" counterpart in the FLSA, including: (1) CLC sections 201-203, which govern the payment of wages upon termination or discharge[5]; (2) CLC section 2802, which governs the reimbursement of necessary business expenses[6]; and (3) CLC section 226, which obligates employers to provide their employees with itemized wage statements.[7] Thus, depending on the claims asserted in an underlying wage and hour lawsuit, an exclusion for state law provisions "similar" to the FLSA may not excuse an insurer's duty to defend.

Many EPL and D&O policies also exclude claims arising under federal, state or local "wage and hour" laws. Although such exclusions may bar coverage for certain CLC claims, insured employers and their counsel must pay close attention to the precise wording of such exclusions. EPL and D&O insurers define the phrase "wage and hour" in varying ways, and, in many cases, they do not define the phrase at all. As confirmed in Hanover, depending on how a particular "wage and hour" exclusion is worded, it may not apply to all claims under the CLC and might not excuse an insurer's duty to defend.

Thus, even if an exclusion bars coverage for some or most of the claims and allegations asserted, insured employers still may be entitled to coverage for wage and hour lawsuits — including, in some cases, a complete defense and indemnity against settlements and judgments.

Tip #4: If your insurer contends a "wage and hour" sublimit applies, consider whether any of the claims or allegations asserted fall outside the scope of the sublimit.

Because coverage for wage and hour lawsuits is in high demand, most EPL and D&O insurers now offer employers the option to purchase — for an additional premium — a limited amount of coverage for the cost of defending against wage and hour claims. Such coverage often is expressed as a "wage and hour sublimit."

Frequently, insurers defending wage and hour lawsuits attempt to withdraw from their insureds' defense once defense costs reach the amount of the sublimit. Such conduct is not always justified. Indeed, a wage and hour sublimit only limits an insurer's coverage obligations if it applies to all allegations and claims asserted in a wage and hour lawsuit. Put differently, if any of the asserted

allegations or claims fall outside the scope of the sublimit, an insurer might have broader defense and indemnity obligations under other policy provisions.

For example, in Travelers,[8] an EPL policy included a $100,000 sublimit on coverage for costs incurred to defend claims alleging violations of laws "governing or related to the payment of wages." When the insured was sued for alleged wage and hour violations, the insurer agreed to defend its insured but later withdrew from the defense after contributing only $100,000. The Travelers court held that the insurer had breached its duty to defend because certain of the claims asserted — specifically, a common law breach of contract claim and a statutory claim for the alleged failure to provide required meal and rest breaks — were outside the scope of the sublimit. Accordingly, the court held the insurer should have continued to defend the lawsuit even after defense fees and costs reached $100,000.

Thus, even if an insured's policy includes a wage and hour sublimit, the insured nonetheless might be entitled to a broader defense and indemnity. Therefore, before agreeing that its insurer can rely on a policy sublimit to withdraw from the defense of a wage and hour lawsuit, the employer and its counsel should carefully review the pertinent policy provisions and claims asserted in the underlying complaint.

Tip #5: Do not accept an unreasonable allocation between covered and uncovered amounts.

Many EPL and D&O policies purport to require an allocation between covered and uncovered defense costs and settlement amounts. However, notwithstanding insurer arguments to the contrary, such allocation provisions often have little or no impact on coverage for wage and hour lawsuits. Under California law, expenses "reasonably related to the defense" of a covered claim may be apportioned wholly to the covered claim, and a settlement payment is fully recoverable unless the insurer can show that uncovered claims "increased the amount of the settlement."[9] Accordingly, insured employers should not accept unreasonable allocations that force them to bear disproportionate shares of defense costs or settlement expenses.

Conclusion

Although EPL and D&O insurers routinely resist claims for coverage for wage and hour lawsuits, their positions are not always well-founded. Coverage provisions in EPL and D&O policies typically are quite broad, and insurers often place far too much stock in policy exclusions, sublimits, and allocation provisions. Therefore, when faced with wage and hour lawsuits, employers should look to their EPL and D&O insurers for coverage, and they should view any adverse coverage positions with scrutiny.

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[1] 2016 WL 6698936 (S.D. Cal. Nov. 14, 2016).

[2] See, e.g., Travelers Cas. & Sur. Co. of Am. v. Spectrum Glass Co. Inc., 2012 WL 3780356, at *7-8 (W.D. Wash. Aug. 31, 2012) (alleged failure to provide meal and rest breaks triggered policy's coverage for "failure to create or enforce adequate workplace or employment policies or procedures"); Prof'l Sec. Consultants Inc. v. United States Fire Insurance Co., 2010 WL 4123786, at *3 (C.D. Cal. Sept. 22, 2010) (coverage for "any employment-related misrepresentation" triggered by allegation that employer "[d]isseminated false information [amongst its] employees, reciting that, under [its] labor policies and practices and under California law, the [employees] were not entitled to overtime compensation").

[3] E.g., Horace Mann Insurance Co. v. Barbara B., 4 Cal. 4th 1076, 1084 (1993).

[4] E.g., Atlantic Mut. Insurance Co. v. J. Lamb Inc., 100 Cal. App. 4th 1017, 1038-39 (2002).

[5] E.g., Cal. Dairies Inc. v. RSUI Indem. Co., 617 F. Supp. 2d 1023, 1046-47 (E.D. Cal. 2009).

[6] Id. at 1045.

[7] Id. at 1045-46; PHP Insurance Serv. Inc. v. Greenwich Insurance Co., 2015 WL 4760485, at *8 (N.D. Cal. Aug. 12, 2015).

[8] 2012 WL 3780356.

[9] Safeway Stores Inc. v. Nat'l Union Fire Insurance Co., 64 F.3d 1282, 1289 (9th Cir. 1995).