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PERSPECTIVE

Policies actually might cover wage and hour lawsuits

By Shaun H. Crosner

Wage and hour class actions can be costly to defend and can subject employers to substantial exposure in the form of settlements and judgments. However, employers may be able to defray some or all of these expenses with frequently overlooked assets: their employment practices liability (EPL) insurance policies. Although EPL insurers often contest or deny coverage for wage and hour lawsuits, their positions are not always well-founded. Indeed, a number of courts have confirmed that EPL policies can provide broad coverage for lawsuits alleging wage and hour violations. Because coverage for such claims invariably turns on a nuanced analysis of the specific allegations and policy terms at issue, employers should not blindly accept adverse coverage positions from their EPL insurers.

Indeed, in August, a judge in the Northern District of California ruled that an EPL insurer breached its policy obligations by denying coverage for an underlying putative wage and hour class action. In *PHP Insurance Service Inc. v. Greenwich Insurance Co.*, 2015 U.S. Dist. LEXIS 106274 (N.D. Cal. Aug. 12, 2015), the underlying complaint included various causes of action under the California Labor Code, including one for failure to provide itemized wage statements as required by Labor Code Section 226. PHP's insurer, Greenwich, denied coverage, arguing that the underlying lawsuit did not allege any "Wrongful Employment Acts" as defined in the policy and that, in any event, coverage was barred by the policy's exclusion for violations of the Fair Labor Standards Act (FLSA) and "similar provisions of any federal, state or local statutory or common law."

Noting the breadth of an insurer's defense obligation under California law, the *PHP* court held that Greenwich breached its policy obligations in denying coverage. The court observed that the underlying lawsuit alleged that PHP hired "recent immigrant workers to improperly take advantage of their lack of knowledge regarding labor and employment rights" and failed to implement "'a policy to relieve employees from their duties during meal breaks.'" These allegations, when read in the context of the broader complaint, were considered sufficient to raise the potential for covered "Wrongful Employment Acts," a phrase defined in the Greenwich policy to include "discrimination" and "harassment." The court in *PHP* also held that the exclusion for state law provisions "similar" to the federal Fair Labor Standards Act did not bar coverage for all claims and allegations in the underlying complaint, specifically stressing that California Labor Code Section 226 could not be deemed "similar" to the Fair Labor Standards Act, which does not require employers to provide itemized wage statements. Thus, because the exclusion did not apply to the alleged violations of Section 226, it did not excuse Greenwich's defense obligation.

As *PHP* makes clear, wage and hour complaints can include allegations and causes of action falling within expansive EPL policy coverage grants. Indeed, EPL policies often 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. A number of courts have held that these phrases can encompass frequently asserted allegations in wage and hour lawsuits. See, e.g., *Prof'l Sec. Consultants Inc. v. United States Fire Ins. Co.*, 2010 U.S. Dist. LEXIS 113902, *7-12 (C.D. Cal. Sept. 22, 2010) (policy's 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"); *Travelers Cas. & Sur. Co. of Am. v. Spectrum Glass Co. Inc.*, 2012 U.S. Dist. LEXIS 124620, *21-23 (W.D. Wash. Aug. 31, 2012) (allegations regarding employer's failure to provide required meal and rest breaks potentially fell within policy's coverage for "failure to create or enforce adequate workplace or employment policies or procedures").

Furthermore, although some EPL policies exclude coverage for violations of the Fair Labor Standards Act "and similar provisions" of state law, numerous courts have recognized that certain sections of the California Labor Code have no parallel or "similar" counterparts in the act. For example, courts have found that the Fair Labor Standards Act is dissimilar to California Labor Code Sections 201-203, which regulate payment of wages upon termination or discharge. E.g., *Cal. Dairies, Inc. v. RSUI Indem. Co.*, 617 F. Supp. 2d 1023, 1046-47 (E.D. Cal. 2009). Courts likewise have found that Labor Code Section 2802, which obligates employers to reimburse their employees for necessary business expenses, has no parallel in the FLSA, as well as that the FLSA contains no provision "similar" to Labor Code Section 226. *E.g., id.* at 1045-46; *PHP*, 2015 U.S. Dist. LEXIS 106274 at *23-24. Thus, depending on the specific claims and allegations asserted, an exclusion for violations of state law provisions "similar" to the Fair Labor Standards Act may not altogether excuse an EPL insurer's coverage obligations.

Notably, if there is even one potentially covered allegation or claim in a complaint, an insurer generally will be required to fund a defense to the entire lawsuit — even if most of the allegations and causes of action are uncovered. See *Horace Mann Ins. Co. v. Barbara B.*, 4 Cal. 4th 1076, 1084 (1993). And although some EPL policies purport to require an allocation between covered and uncovered defense costs and settlement amounts, such allocation provisions might have little or no impact on coverage for wage and hour lawsuits. Indeed, under California's rules of allocation, 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." *Safeway Stores Inc. v. Nat'l Union Fire Ins. Co.*, 64 F.3d 1282, 1289 (9th Cir. 1995).

In an effort to reduce their exposure to lawsuits alleging wage and hour violations, many EPL insurers now expressly include a very limited amount of "wage and hour" coverage — often expressed as a "wage and hour sublimit" — in their policies. The insurers' theory apparently is that by providing limited wage and hour coverage rather than attempting to exclude coverage altogether, they can cap their exposure for such claims. However, depending on their precise wording, such sublimits may not apply to all allegations and claims asserted in a wage and hour lawsuit. As a result, an insured employer may be entitled to broader defense and indemnity coverage under other policy provisions.

For example, in *Travelers*, 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." 2012 U.S. Dist. LEXIS 124620 at *1. The court held that the sublimit did not unambiguously apply to all claims in an underlying wage and hour lawsuit — including a common law breach of contract claim and a Washington statutory claim alleging a failure to provide required meal and rest breaks. Because coverage for these claims was in no way limited by the policy's sublimit, the court found that Travelers had breached its coverage obligations and acted in bad faith by invoking the sublimit and withdrawing from the defense after contributing only $100,000.

Thus, although some insurers might not acknowledge it readily, EPL policies can provide broad coverage for wage and hour lawsuits. When EPL insurers deny coverage or attempt to impose sublimits for such claims, employers should closely review their policy terms and the allegations made in the underlying litigation. Doing so will ensure that employers obtain the full benefit of their EPL coverage.

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