

# PUBLIC RISK



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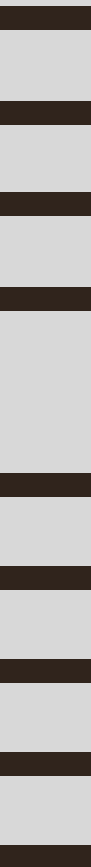
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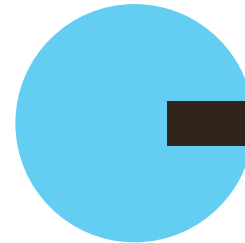


# EMPLOYMENT PRACTICE LIABILITY TRENDS

## AND HOW TO REDUCE THE RISK OF CLAIMS

BY GREG ZAROTNEY





# **T**HERE IS BOTH GOOD AND BAD NEWS for employers about employment practice liability (EPL).

The good news is that total employment practice charges have been decreasing. The U.S. Equal Employment Opportunity Commission (EEOC) received approximately 61,000 charges in 2021, a notable decline from the average 86,354 charges per year it received over the previous 10 years.

The bad news is that the cost of employment practice complaints is rising sharply. There are a number of reasons for the increase. These include social inflation, which is the rising cost of insurance claims for costs not accounted for in general economic inflation. A factor contributing to social inflation is shifting societal attitudes that lead to juries awarding

more and larger settlements than they did in the past. “Nuclear verdicts” (awards exceeding \$10 million) have become more common.

Also, because EPL lawsuits can be complex to defend, employers can expect to spend a significant amount of time and money to reach a settlement or have a case decided in court.

## **EMPLOYMENT TRENDS**

There are a number of employment trends contributing to EPL charges being filed against organizations large and small. Awareness of how these trends affect the workplace and taking steps to prevent them will help reduce the chance that public entities will face EPL charges, claims and lawsuits.

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## RETALIATION

Workplace retaliation—inappropriate actions taken by an employer against an employee for exercising their rights—accounts for an average of about 60% of all discrimination charges filed with the EEOC. Besides being the most common type of charge, they are typically the most expensive for employers.

## SOCIAL INFLUENCE

The #MeToo movement went viral in October 2017, heightening public awareness and sensitivity to sexual harassment and sexual assault. Between 2014 and 2017, the EEOC received an average of 6,700 sexual harassment charges per year. There was a notable increase in these charges in 2018 (7,609) and 2019 (7,514).

According to the EEOC, charges alleging sexual harassment and retaliation are often linked. Of the 27,291 sexual harassment charges filed in

2018 through 2021, 43.5% were concurrently filed with a retaliation charge.

## COVID-19

COVID-19 introduced EPL complaints related to issues such as remote work and leave as well as employment discrimination and retaliation in the layoff and rehiring process.

## MARIJUANA AND PSYCHEDELICS USE

Marijuana use is increasing as more states legalize its medical and recreational use. Through state legislative reforms, psychedelic drugs are in the early stages of becoming accessible in some states.

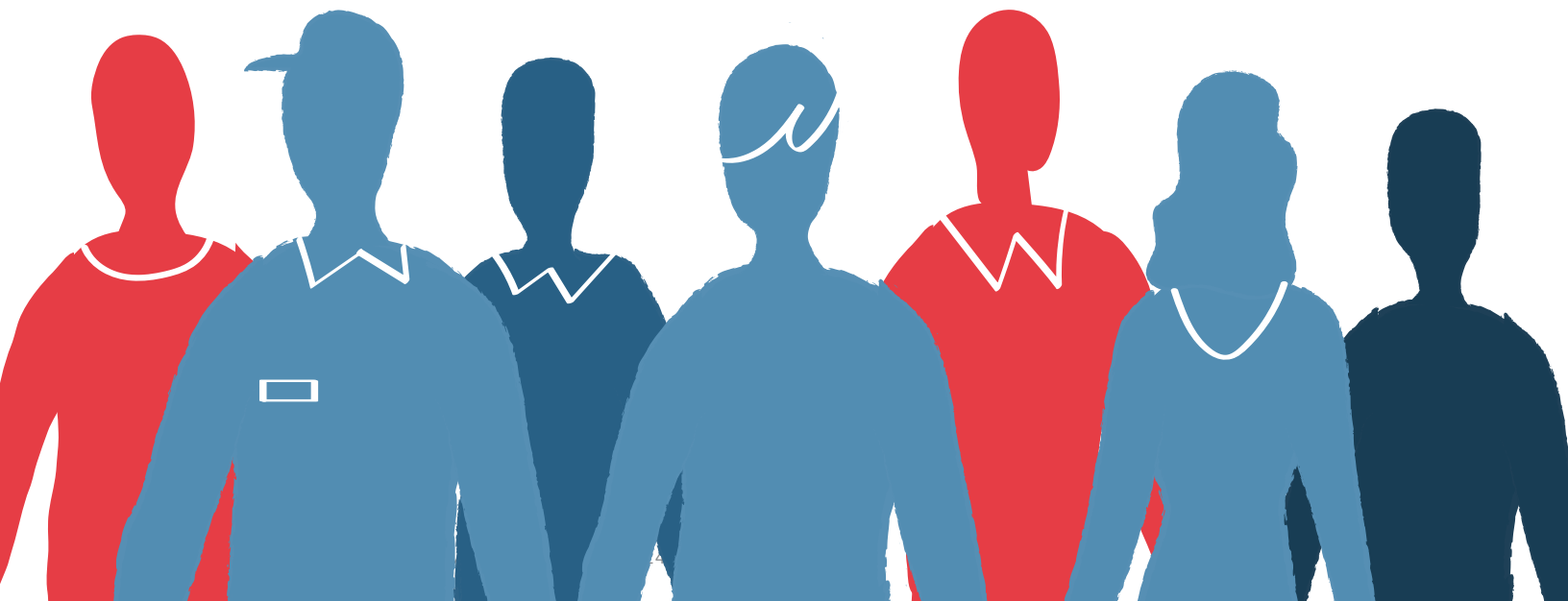
## MISHANDLING OF PUBLIC SAFETY HR ISSUES

Some public entities allow public safety department leaders to manage HR responsibilities independently. This is unwise. Like all

municipal departments, public safety leaders need professional human resources (HR) advice to ensure compliance with local, state, and federal laws. Also, if the police and fire departments are allowed to make their own HR decisions, employees of other departments could claim they are treated differently. In HR, consistency is key, and ensuring that all departments adhere to the same HR policies can help prevent or defend against possible lawsuits.

## TAKE STEPS TO REDUCE EMPLOYMENT PRACTICE LIABILITY RISK

1. Have on staff or consult legal counsel who thoroughly understands and practices employment law. Employment law is a highly specialized field, and many general municipal attorneys do not have the experience to provide advice on complicated HR scenarios.



2. Some insurance carriers provide policyholders with no-cost, third-party human resources compliance support which can include:

- Access to HR professionals and/or attorneys for advice, guidance on developing an employee handbook
- Management and employee training programs
- An anonymous employee hotline to report complaints

If available, take advantage of these types of HR compliance services even if you have in-house HR staff. Consulting another HR professional can uncover potential blind spots if in-house personnel are too close to the issue.

3. Establish clear workplace policies, including those against harassment, discrimination, and retaliation, and those that focus on maintaining a safe workplace, and include them in the entity's employee handbook. Regularly update the handbook to ensure it is compliant with current federal, state and local laws, including those related to marijuana and psychedelics usage. Ensure every employee receives the handbook and acknowledges receipt of the handbook and understanding of the policies by signing an acknowledgment form that is kept on file.
4. Regularly train all employees on workplace policies, including civility and respect in the workplace, to prevent sexual harassment, discrimination, and retaliation.
5. Have a secure method for receiving employee complaints. When a complaint is received, immediately begin a fair and professional investigation, documenting the complaint and what the entity did to resolve it.
6. Purchase employment practices liability insurance (EPLI) coverage for defense costs and damages related to employment-related claims.

*Greg Zarotney is Vice President, Risk Control for Tokio Marine HCC Public Risk Group.*

## EMPLOYMENT PRACTICES LIABILITY INSURANCE

All employers face the risk of prospective, current and former employees alleging discriminatory or retaliatory behavior by the employer. These allegations can lead to charges being filed with the EEOC and costly settlements or lawsuits.

Employment practices liability insurance provides coverage for employers' defense costs and losses for a variety of employment-related claims such as:

- Sexual harassment
- Discrimination
- Wrongful termination
- Breach of employment contract
- Negligent evaluation
- Failure to employ or promote
- Wrongful discipline
- Deprivation of career opportunity
- Violation of the Family and Medical Leave Act
- Mismanagement of employee benefit plans

