

# *Employment Practices Liability*

**Presented by:  
Rose & Kiernan, Inc. &  
Chubb Group of Insurance  
Companies**

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# Today's Presenters

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- **Catherine Padalino, Vice President  
Chubb Specialty Insurance  
Worldwide EPL Product Manager**
- **Jorge R. Weiss, Vice President  
Rose & Kiernan, Inc.**
- **Mary Beth DiBacco, Assistant Vice President  
Chubb Specialty Insurance, Rochester  
Branch Specialty Manager**

# Agenda

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- Litigation Environment
- Understanding Gaps in Insurance Coverage
- Form Review
- Claim Review
- Risk Selection/ Underwriting Process
- Loss Prevention

# LEGAL BASIS FOR EMPLOYMENT CLAIMS



EMPLOYMENT PRACTICES INSURANCE OVERVIEW

# Today's Legal Environment

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**Economy & Employment Claims Correlation**

**New Administration – President Obama**

**Employment Laws & Supreme Court Rulings**

# Today's Legal Environment

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## **Other Hot Topics**

Wage & Hour; Bullying; Immigration;  
E-Discovery; Workplace Violence;  
Wellness Programs; Privacy; Aging  
Population; Testing; Unconscious Bias;  
Social Networking Sites

## **EEOC**

Statistics - Initiatives - Guidance

## What's the basis for lawsuits?

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- Title VII of the Civil Rights Act of 1964
- Civil Rights Act of 1991
- Section 1981 of Civil Rights Act of 1866
- Age Discrimination in Employment Act of 1967 (ADEA)
- Americans with Disabilities Act of 1990 (ADA)
- Fair Labor Standards Act of 1938 (FLSA)
- Common Law – wrongful discharge, breach of contract, negligence

## How are state laws different?

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- Number of employees required to comply
- Additional protected status/class
- Punitive damages (cap versus no cap)
- Direct access to courts (no administrative procedures required)
- Additional benefits (employee leave rights, privacy protections, unique wage & hour rules, cause of action requirement for wrongful discharge, etc.)



CLAIMS AND LITIGATION ENVIRONMENT

## Public policy, tort claims, breach of contract ...

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- Wrongful discharge
- Retaliation
- Express or implied contracts
- Defamation
- Other Torts – negligent:
  - hiring
  - evaluation
  - training
  - retention
  - supervision



## Types of Employment Claims

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- Charges of Discrimination
- Demands for Arbitration
- Lawsuits

## EMPLOYMENT PRACTICES INSURANCE OVERVIEW

### EEOC CHARGES

<u>Filing Basis</u>	<u>2009</u>	<u>%</u>	<u>Comment</u>
Race	33,579	(36%)	Record high level
Retaliation	33,613	(36%)	2.8% increase over 2008
Sex/Gender	28,028	(30%)	Record high level
Age	22,778	(24.4%)	Second highest level ever
Disability	21,451	(23%)	Record high level
National Origin	11,134	(11.9%)	Record high level
Religion	3,386	(3.6%)	Record high level
<b>TOTAL</b>	<b>93,277</b>		<b>Just short of 2008 record high level</b>

- **Sexual harassment** charges totaled 12,696 (16% filed by men).
- **Pregnancy** related charges 6,196, up 26% over 2006.
- EEOC filed 281 merit lawsuits, and recovered **\$376 million** in monetary relief, excluding relief from litigation.



# Employment Claims are Costly

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## **Loss Scenarios for Private Companies**

120 employees, \$18million revenues,  
Midwest, Age Discrimination Claim

40 employees, \$3.7million revenues,  
Northeast, Wrongful Termination Claim



# Recent Loss Scenarios

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- Small, informal company with 5 employees
  - Hostile work environment
- Mid-sized company
  - Wrongful termination and retaliation

# Gap Analysis

# Typical Gaps in Traditional Coverage

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- A **general liability** (GL)<sup>1</sup> policy covers “occurrences” and may not respond to claims requiring intent to act (such as common EPL claims like discrimination and wrongful termination).
- **Workers compensation** will cover an injury event but not retaliation against an employee who files a workers’ compensation claim
- An **umbrella** policy typically contains the same coverage exclusions as a GL policy

<sup>1</sup>GL policy references are based on the commercial ISO policy

# Typical Coverage Gaps

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- Directors and officers (D&O) liability insurance is designed to provide coverage for the individual and typically excludes coverage for claims against the corporation itself (the entity).
- A D&O policy typically excludes coverage for claims made by employees (including officers).

# Coverage Gap Summary

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Traditional policies (GL, Workers' comp, umbrella, D&O)-  
May not cover the employment practices liability arising out of:

- Employee interviewing, testing, and references.
- Employee hiring (or failure to hire), orientation, education and training, evaluation, failure to promote, discipline or wrongful termination.
- Employee handbooks and other employment documentation.
- Retaliation against an employee.

# FORM REVIEW

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## EPL Coverage Overview

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### **6 Key Questions in any Form Review:**

1. Who is “Insured” under the policy?
2. What “Triggers” coverage?
3. What “Claim Reporting” obligations exist?
4. Who “Defends” the claim?
5. Who may settle the claim?
6. What are the coverage limitations?

# RISK SELECTION/ UNDERWRITING PROCESS

## Risk Selection & Underwriting Focus Areas

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- Size / Employee Count
- Geography / Domicile
- Industry
- Image
- Exposure to Class-Action Litigation
- Diversity Statistics / EEO-1 Reports
- Diversity Initiatives & Self-Critical Analysis
- Loss History
- Claims Management
- Prior Insurance
- Human Resources

## Risk Selection & Underwriting Focus Areas

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- Training
- Layoffs
- M&A Activity
- Turnover
- Compensation
- Employment Contracts

# Evaluating Layoffs

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## **Reduction in Workforce Assessment:**

- WHEN
- HOW will it be communicated
- HOW MANY
- WHO
- WHY
- WHAT is the criteria for determining affected individuals (what locations)

# Underwriting Layoffs

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## **Reduction in Workforce Assessment:**

### Precautions:

- Outside counsel utilization
- Adverse impact assessments
- Exit interviews
- Outplacement services
- Enhanced Severance Packages
- Waivers
- OWBRA (Older Worker Benefit Protection Act)
- WARN (Worker Adjustment & Retraining Act)
- Future layoffs

# Employee Handbook

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- At-will policy
- EEO/ antidiscrimination statement
- Anti-harassment policy (definitions, no tolerance policies, reporting information, procedures, follow-up)
- Complaint procedures, investigation, confidentiality
- Discipline/ conduct
- Leave policies (FMLA, Unpaid leave of absence, military, short term/long term disability, parental)
- Signed acknowledgment of receipt

# Specialty Claims



# Specialty Claims Handling

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- What is a claim?
- When should a claim be reported to the carrier?
- What can an Insured expect upon reporting a claim?
- What is the Duty to Defend?
- How can an Insurer distinguish itself in the way it manages the claims process?



# What is a Claim?

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A Claim can be:

- Demand letter
- Civil Proceeding
- Arbitration Proceeding
- Charge of Discrimination
- Tolling Agreement



## When to Report a Claim?

***“ As Soon As Practicable ”***

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### Benefits of Prompt Reporting?

- Claims handling expertise
- Timely assistance with defense counsel selection
- Implementation of an effective defense strategy after thorough investigation



## Early Claim Reporting Incentive Endorsement

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# First of Its Kind

- Provides Customers who Notify Chubb within 15 Business Days of an Employment Claim with a 10% reduction (up to \$50,000) in their deductible.
- Available for Each Claim Reported During the Policy Period



# What to Expect Upon Reporting?

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The Claim Process:

- **Investigation**
  - Coverage
  - Factual
- **Liability**
- **Damages**
- **Resolution Strategy**

# LOSS PREVENTION SERVICES

# What's keeping the HR Manager up at night?

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- Difficult economy
- Limited corporate resources
- Cost cut pressures
  - Training
  - Staff Reductions
  - Loss Control
  - Insurance
- Exposure increases
  - > Decrease productivity, lawsuits, charges
  - > Lawsuits & EEOC charges
  - > Lack of knowledge, inadequate policies
  - > Negative financial impact

\* *The bar has been raised for employers and it will continue to be raised ...*

# How to clear the hurdle?

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Supreme Court has provided employers with a map...

- Publicize policies and procedures
- Train employees on the law
- Establish internal complaint resolution process
- Train internal “investigators”
- Impose effective sanctions

*Loss Prevention is critical ...*

## Available Loss Prevention Resources

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- Desk reference- information on employment laws or sample h/r policies
- Newsletters- on line, hard copy
- Toll free hotline- to ask employment questions or to report claims
- On line resource library
- Audits- self or external
- Seminars- on line, in person
- Loss prevention consultant services

# Chubb Loss Prevention Program AS AN EXAMPLE

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**EPL Loss Prevention Web Site**

**ChubbWorks<sup>SM</sup>**

**Loss Prevention Consultant Services**

**Toll-free Hotline**

***Employment Practices Loss Prevention Guidelines***  
**manuals**

# ChubbWorks<sup>SM</sup> SUMMARY

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- Free On-line Resource created exclusively for Chubb
  - Easy Registration
  - Free Training
  - Model Forms
  - Model Policies
  - Library of Resources
  - Customization
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- If purchased separately costs between \$1,000 and \$10,000
  - 60 day Free Trial available to prospective clients

## Top HR Product of the Year, HR Acuity On-Demand - a New Offer for Chubb EPLI Customers

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- Access through Chubbworks
- Reduce legal and financial risks associated with employee misconduct with HR Acuity On-Demand, a complete employee relations tool including a workplace investigation methodology
- HR Acuity offers 20% discount on first year subscription rate and Chubb helps pay annual cost through Loss Prevention Consultant Services Program

*Any Questions?*

Thank you for your time.