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The Labor & Employment Practice Group at Murtha Cullina is pleased to provide clients and friends with information about topics of interest in the labor and employment area.

If you have any questions about the issues addressed here, or any other matters involving labor and employment legal issues, please feel free to contact the following attorneys:

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LABOR & EMPLOYMENT UPDATE

EMPLOYMENT PRACTICES LIABILITY INSURANCE: SURPRISE COVERAGE INTERPRETATION

Employment Practices Liability Insurance (“EPLI”) provides some employers with the comfort that if employees or former employees sue them, the insurance company will pay both the costs of defense and the settlement amount or the judgment in the case. However, a recent decision by the Connecticut Supreme Court places that coverage at risk for a reason that will likely surprise most employers.

In *National Waste Associates, LLC v. Travelers Casualty and Surety Company of America*, a decision released by the Connecticut Supreme Court on January 19, 2010, the Court held that because an employee had filed a claim for unemployment benefits prior to the policy period, the policy did not cover the lawsuit filed during the policy period. The employer in *National Waste* purchased an EPLI policy from Travelers. That policy, like nearly all commercially available EPLI policies, was a “claims made” policy. That means that the policy covered claims first made during the policy period. The policy excluded claims that had been made prior to the policy period, whether they had been made in a court, a criminal proceeding or an “administrative or regulatory proceeding.” After the policy period commenced, a former employee filed a wrongful discharge lawsuit against the Employer. Unlike a discrimination claim, where the employee must first file the claim with an administrative agency before proceeding to court, the employee here was not required to file her wrongful discharge claim with an administrative agency. Once served with the lawsuit, the Employer forwarded the lawsuit to the insurer, expecting that the insurer would defend the claim. However, the insurer denied coverage.

The Employer brought a lawsuit seeking a declaration that coverage existed for the wrongful discharge claim under the policy. The insurer raised several arguments against coverage. The Connecticut Supreme Court decided that the exclusion in the policy for administrative proceedings initiated before the policy went into effect justified the denial of coverage. The “administrative proceeding” at issue was a claim for unemployment compensation benefits filed before the Employer took out the policy.

As an exercise in closely reading the words of the policy, the Court’s decision is defensible. An unemployment proceeding is pretty clearly an “administrative proceeding.” However,

the result no doubt shocked the Employer. One could anticipate an argument that if the claim had been one of discrimination, and a CHRO or EEOC Charge had been initiated prior to the commencement of the policy period, that particular claim would be excluded from coverage. However, the legal issues and burden of proof differ in an unemployment compensation proceeding from those in a lawsuit, whether based on a common law claim, like wrongful discharge, or a statutory violation, like age discrimination. Further, unemployment compensation claims are not only very common, but they are typically handled differently by employers. (For example, employers rarely if ever engage legal counsel to attend unemployment compensation hearings.) The standard for denying unemployment benefits is so high that employers often do not even contest the claims. Even if they do contest, most former employees who lose their jobs for any reason collect benefits. In fact, a claim for unemployment benefits is not even really a claim “against” the employer - it is a claim for state benefits that are funded by a tax on all employers. Moreover, no EPLI policy provides coverage for unemployment claims.

The scary aspect of this new Supreme Court decision is that an insurer can now deny coverage of, for example, an age discrimination claim even when the employer provides timely notice of that age discrimination claim filed with the CHRO. This might occur if the former employee previously had filed a claim for unemployment compensation benefits and had mentioned his age as a factor in his termination, and the employer had not put the insurer on notice of the unemployment compensation claim. This could happen even though the legal issue of age discrimination is not an issue that the Department of Labor is charged with deciding in an unemployment compensation proceeding.

Practical Advice

If you have EPLI coverage, you should read your policy carefully. If you are charged with giving the insurer notice of “administrative proceedings,” you need to consider providing your insurer with notice of each and every unemployment compensation claim that a separated employee files, whether because of a layoff, a voluntary quit, or a discharge. If you are considering obtaining EPLI coverage, or changing it, you need to consider whether there are any pending or concluded unemployment compensation proceedings that might later result in other claims for which you would be seeking a defense and indemnity from your insurer.

Murtha Cullina LLP combines a leading labor and employment practice with a premier insurance coverage practice. If you need assistance with insurance coverage, including EPLI coverage, contact one of the following attorneys:

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