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LITIGATION: EMPLOYER'S INSURANCE CAN MEAN MORE MONEY TO SETTLE CLASS ACTION  
LAWSUITS, LAWYERS TOLD

ATLANTA--Attorneys bringing wage, hour, and labor class action lawsuits against employers can use an employer's insurance coverage to potentially have a claim defended by an insurer and additional money to settle it, Kenneth A. Remson, an attorney with Dickstein Shapiro LLP in Los Angeles, said June 27 at the National Employment Lawyers Association's 19th annual meeting.

Remson made his comments at a conference session titled "Using Defendant's Insurance Against Them." Many plaintiffs' employment lawyers do not know how to demand insurance coverage information, read a policy, or determine coverage, he said, but it can be important to the success of a case.

"The more money that the insurer puts in the hand of the policyholder, the more money that they have to settle with you to pay you and pay your class," Remson said.

In many cases, he said, whether an insurer is paying for a defense or not, they are still going to have someone defending the action. In many cases, the policyholders have to do what is called "pay and chase," where the employer has to deal with the lawsuit and fight with the insurance company after the fact, Remson said.

Provide Notice Immediately.

When a lawsuit is filed, the most critical thing a policyholder must do is provide notice to the insurer, Remson said. Most of them do not believe they have such coverage and fail to give notice within a certain amount of time, and most insurers will not pay any claim until they receive notice, he said.

And, if a case gets far enough along to where it is settled or there is a judgment, "that will almost always preclude any kind of coverage," Remson said.

"The critical initial thing is for the policyholder to give notice and to give notice to any type of insurance whether or not they think it applies," he said.

That includes comprehensive general liability policies, which may have an endorsement that will provide coverage for employment practices liability, Remson said. Sometimes there are other types of coverage as well, such as personal injury coverage, that may not be subject to an employment exclusion,

he said.

In addition, there are directors' and officers' policies that companies do not think of looking to, he said. Inside many of those policies there is entity coverage, which provides coverage for the entity in addition to individual directors and officers, Remson said. Some of the that coverage may be applicable to employment claims, he said.

But the primary insurance policy that employment lawyers should focus on is employment practices and liability coverage, Remson said. In some cases it will be stand alone coverage or a separate policy, he said.

Or it may be an endorsement that adds or alters coverage, he added, which will sometimes be added to a general comprehensive liability policy. The coverage is typically very broad, he added, and includes traditional employment claims of sexual harassment, discrimination and wrongful termination, as well as workplace torts or employment practices violations.

Sometimes there are package policies stapled together with a declarations page that will have some employment practices and liability coverage, Remson said.

How Insurers Will Respond.

Weeks and weeks after being given notice, Remson said, the first thing the insurer will do is send a 10-20 page letter detailing what coverage the policy provides and why an employer's claim is not covered. "It's just absurd," he said.

Typically, Remson said, insurers will say there is a public policy against restitution or disgorgements, that wages are not covered, that there is an Fair Labor Standards Act exclusion in the policy, and that the policy does not insure for willful acts of the employer.

But, he said, California courts have consistently ruled that an insurance company must defend a suit that potentially seeks damages within the coverage of the policy. "The duty to defend is broader than the duty to indemnify," he said.

"If there's anything at all that's potentially covered, the insurer is on the hook for defense coverage," he said.

Remson said he has had success with policies that cover employment-related misrepresentation to employees or applicants, which can cover such things as misclassification of an employee, exempting them from overtime, telling them they are not entitled to certain breaks, or pay for the time they put on or take off their uniforms, or if they are told that their employment is in conformity with law.

The potential inaccuracy of wage statements can be another form of

misrepresentation, he added.

Failure to provide or enforce adequate or consistent corporate policies and procedures related to any employment practices can also be a potential misrepresentation, Remson said, that covers overtime, breaks, and wage statements.

By Barney Tumey

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