



A Law Firm's Exposure to Employment Practices Liability – An Insurer's Perspective



**PARAGON'S INTERVIEW WITH WAYNE IMRIE,
MANAGEMENT LIABILITY UNDERWRITER AT BEAZLEY**

The success of the #MeToo movement in exposing abuse of power and the increased focus on discrepancies in gender pay have both shone a spotlight on the Employment Practices Liability (EPL) risks modern law firms face.

In response, Paragon has used our position as a market leader in law firm liability business, to develop a unique product that offers broad and innovative coverage to protect against the financial exposures generated by these risks.

Paragon's following interview with Wayne Imrie, Management Liability Underwriter at Beazley, highlights some of the issues that law firms might wish to consider.

Q WHAT COULD LAW FIRMS BE DOING TO REDUCE THEIR EMPLOYMENT PRACTICES LIABILITY (EPL) EXPOSURE?

A Wayne Imrie: We are very keen for firms to be proactive on workplace training, which is very topical at the moment with the whole #Me Too Movement. We like to see that sexual harassment training is being conducted on an annual basis, so we know it is up to date and everyone is aware of the issues out there. Undertaking diversity studies makes sure the firm is doing everything they possibly can from a diversity point of view. There is a big focus on gender at the moment but this goes beyond gender to look at race, religion and sexual orientation. If you look at many firms against the demographics of the actual city they are based in, they would probably stick out against those demographics as not being a fair split. That is something that all firms should be acutely aware of so they can negate any issues of discrimination from cropping up. Obviously at the moment gender pay is a hot topic, having the ability or proactiveness to conduct some kind of study into how the pay equity is within the firm, and if there is any disparity, is a positive. It doesn't necessarily have to be an external party coming in to conduct the study. It can just be an internal study, but actually having that proactive approach to say: "We are looking at it and if we have got an issue, then we are trying to resolve it."

Q WITH REGARDS TO THE STUDY, IS THERE A POTENTIAL BENEFIT TO A LAW FIRM UTILIZING ANOTHER SPECIALIST LAW FIRM AND MAINTAINING SOME KIND OF ATTORNEY-CLIENT PRIVILEGE?

A WI: Absolutely, using a firm that specializes in that area and can give an external viewpoint, as well as having client-attorney privilege, is a huge benefit. It shows the firm are very proactive if they are willing to open themselves up to an external party. Their reaction to whatever the results of that study or audit, and how they look to remediate any issues they face, is going to be key. External is better than internal, internal is better than doing nothing.

Q WHAT DO YOU SEE AS THE NUMBER ONE TYPE OF EPL CLAIM FOR LAW FIRMS AND HAS THAT CHANGED IN THE LAST FEW YEARS?

A WI: The number one source for us has still very much been the wrongful termination issues. Although, with the #Me Too Movement and the gender pay, we are starting to see those claims catch up and they will likely outgrow the wrongful termination claims. A lot of the wrongful termination claims we'd seen prior to that were regarding constructive dismissals as well as de-equitizing of partners. As we went through the financial downturn those partners who were potentially underperforming were being put under pressure as the firm was stressed from a financial point of view, so we did see a definite uptick in that area. Current trends are very much focused on the harassment issues and the gender pay issues.

Q HAVE YOU SEEN LARGE NUMBERS ATTACHED TO THOSE CLAIMS AND ARE THEY PROVING EXPENSIVE TO DEFEND?

A WI: They are expensive to defend. Any claim in those arenas is always going to be expensive because the firms themselves have that reputation issue. They want to protect their reputation and don't necessarily want to be dragged through the press with negative stories. So, from that point of view they are willing to spend money upfront. From a settlement point of view, we are seeing that the #Me Too Movement is inflating everyone's opinion of sexual harassment claims and any kind of gender-related claims. Any plaintiff bar letter that we receive now is vastly different and vastly inflated from what we had seen previously. And they want to test things. They are saying, "Do you want to put this in front of the jury and with the current public perception of this kind of abuse of power; do you want to roll the dice?" Obviously, the firms don't want to do that and we don't want to do that as an insurer. It is a difficult position at the moment, we still want to look at the merits of the actual claim and what the claim is worth rather than what the public opinion may be and what the inflated number may look like.

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Q IN TERMS OF EPL CLAIMS, WITH THE GLOBAL NATURE OF SOME OF THE LARGE FIRMS NOW AND THIS SHIFT TO TRANSATLANTIC MERGERS AND INTERNATIONAL TIE-UPS, ARE YOU SEEING HOT JURISDICTIONS, NOT JUST IN THE US BUT INTERNATIONALLY AS WELL?

A WI: Yes, the US is obviously where most of the claims are and California leads the way there. New York is also heating up and outside of that Florida, DC, Texas and Illinois. So, it's what you'd expect to see in the big metropolitan areas where there are large law firms. Outside of the US, we are seeing more and more issues arising out of London. A lot of those have come from the active merger and acquisition environment and firms becoming more global. As they become more global and they merge together, you start to get the efficiency of scales as some people drop out. The practices and some partners who were maybe earning decent money are being let go. We've seen age discrimination issues arising in London. We have seen some similar issues arising out of continental Europe, Germany and France from where firms have maybe over-expanded. If the need for that business disappears and then suddenly you find firms closing these satellite offices. That's very difficult, especially if you are in France where it is particularly difficult to close anything down or conduct a reduction in force. We have seen firms tripping over that issue and that becomes quite costly. Maybe there is a misconception amongst some US firms that all exposure lays in the US.

Q DOES THAT EXTEND FROM EMPLOYEES THROUGH TO PARTNERS?

A WI: Absolutely. There is more protection for the employees as they are deemed to be employees of the firm, rather than partners who are meant to be owners of the firm. But it's still a difficult issue, unless that partner is willing to move elsewhere within the network and continue practicing for that firm. Alternatively, they will need to find their own firm so it becomes an expensive job to agree a severance package.

Q FACED WITH AN EPL CLAIM, WHAT DO YOU SEE AS THE KEY ASPECT OF SUCCESSFULLY MANAGING THAT CLAIM AND THE POSITION THAT BEAZLEY TAKES?

A WI: We fully encourage a very proactive approach. If necessary, we encourage some kind of investigation, whether internal or external. We actively encourage early settlement negotiations. Any litigation is expensive; any litigation that drags on becomes more and more expensive. It's a drain on all those involved; time is a huge part of that and for a law firm that is quite critical because they are in the business of practicing law and billing hours. They do not need to be dragged away for intensive discovery, depositions or mediations that can go on for days. If we can engage in early and proactive settlement negotiations then that is what we try and do. Try to negate that ongoing cost of litigation. It also helps from a reputation point of view for the firm, which they will be focused on. Jumping on things early and quickly. Nobody benefits from something festering for a long time and it potentially being dragged through the press. So that's really our key, getting in there and investigating, finding out if there is really an issue and how serious that issue is. Then it is getting the plaintiffs around the table, and getting this resolved early before it becomes a problem.

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Q AND SIMILARLY, YOU'D BE SUPPORTIVE OF A FIRM THAT REALLY FELT THAT THEY REALLY HAD NO GROUNDS TO ANSWER A CLAIM AND WOULD WANT TO DO THE RIGHT THING?

A WI: Absolutely and we have done that quite often. There are claims where there has been no wrongdoing and the investigation will throw that up. On those occasions, you know it makes sense to spend the litigation costs defending your position proving that there has been no wrongdoing. We have worked with firms in past and have gone all the way through the process of litigating, all the way through trial to prove that and have come out successful. We will fully support the right claim at the right time, with the right fact pattern. We will fully support it and we will fight it.



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Q TO A FIRM CONSIDERING PURCHASING EPL COVERAGE FOR THE FIRST TIME, IN YOUR OPINION, WHAT ARE THE TOP FIVE THINGS THEY SHOULD LOOK AT IN TERMS OF COVERAGE?

A WI: First and foremost, make sure that the coverage actually covers all individuals working at or for the firm. I still see some EPL policies slipping through the net, where they cover the employees but not necessarily the actual partners - partners being deemed the owners of the firm, rather than employees. Another coverage element that is key for a law firm is failure to make partner. Again, that's not always in every EPL policy and it is critical coverage. Not everyone on the associate track is going to make partner and at some point, someone is going to feel aggrieved. They will have a reason why they failed to make partner and that will morph into some kind of discrimination issue, rather than being about their performance. There are lots of additional coverages out there nowadays. Policies should include the cost of training, some element of crisis fund, employment event coverage and workplace violence are now becoming key areas that should be included, as well as an element of first party privacy. Cyber is an area that is growing; firms need to take a look at their cyber risk, whether that's something they buy standalone or something that is covered by their Professional Liability with their EPL policy picking up some element of first party employee data, breach of health or personal/confidential information. That's something that should be readily picked up by an EPL policy. Likewise, there should be some element of Wage & Hour defense coverage. We've seen Wage & Hour claims popping up in the law firm space with misclassification of individuals. We've seen it with unpaid interns, we've seen it with contract attorneys arguing about overtime pay. Those issues are there and law firms are not immune. Finally, if it's a very good EPL product then you should benefit from additional risk management services and those should come at no additional cost. The good EPL providers will have a very robust risk management

services program that could be very helpful to a law firm. Law firms are highly educated and sophisticated entities that should be at the top end, from a risk management point of view, but they don't necessarily know everything. They can still trip up so this is hugely beneficial. We have hotlines, we have training, and we provide handbooks. We have a very robust Human Resources (HR) system - a 24-hour HR hotline, which can be used just as a sounding board. The firm may be doing it absolutely correctly, it's just nice to have a second set of eyes on something. Just to make sure that the employment decisions being made are the correct ones.

Q WHAT DO YOU SEE AS THE BIGGEST MISCONCEPTIONS OF LAW FIRMS WHO ARE DISMISSIVE OF BUYING AN EPL COVERAGE AND THINK THEY DON'T NEED IT?

A WI: Firstly it is firms that are involved in the areas of employment and labor. Those firms feel very much that as experts in the area, they've got their policies and procedures pretty much buttoned down, to the point where they shouldn't suffer or experience claims. From our experience it doesn't work out that way. Unfortunately, as good as you are there is always going to be someone who is going to be disgruntled somewhere along the line. They will bring a claim and then that becomes an expensive issue that you have to defend/fight/resolve. The other misconception is that a lot of the firms are partnerships and they believe in the strength of their partnership, which a lot of times is very strong. They believe all partners are very happy and if they are unhappy it can be resolved at the partnership level without becoming a legal dispute. You can't keep everyone happy all the time and not everyone thinks in the same way. So, you only need one bad apple and that starts to become a problem. It becomes an expensive problem for firms if they do not have adequate coverage to protect their balance sheet.



Q

WE HAVE #METOO, THE GENDER BIAS ISSUES, CERTAINLY HOT TOPICS AT THE MOMENT. LOOKING AHEAD AT THE NEXT 12, 24 OR 36 MONTHS DO YOU SEE ANY FUTURE TRENDS THAT YOU THINK THAT WE SHOULD BE LOOKING AT NOW?

A

WI: Our view currently is that gender is probably like the tip of the iceberg and diversity will become more and more of a focus. Gender is going to be the start and it's going to morph into race, religion, sexual orientation and it's about the firms matching the demographics of where they are situated. A lot of firms currently don't look or feel like the cities in which they are based. There will be further questions about that, as to why firms look very different from a demographics point of view. There will be pressure to provide development opportunities for all areas, all genders, all race and religions and there will be a regulatory focus from that point of view, regulators will have a stronger look at those areas in the future.

Q

THE EQUAL EMPLOYMENT OPPORTUNITIES COMMISSION (EEOC) HAS NOW SAID THAT THEY ARE REINSTATING THE REQUIREMENT TO SUBMIT THE EEO1 REPORT. PRESUMABLY THAT'S GOING TO HAVE SOME IMPACT?

A

WI: That's definitely going to provide more focus. A few years back the EEOC were actually using those EEO1s and analyzing them and trying to spot issues without having to go in and fully investigate. For them to go in and spot areas that concern them, that's pretty easy. If you are picking up an EEO1 for someone that's based in a city like Atlanta and it doesn't correspond with or doesn't look anything like the demographics of that city, then you start to dig deeper. Is there some kind of systemic discrimination going on? Why is the firm not hiring or promoting in a way that matches the demographics?

Q

WHAT ARE SOME OF THE BIGGEST SETTLEMENTS YOU'VE SEEN FROM THE EPL AND ML SPACE?

A

WI: A lot of the larger EPL issues that pop up, tend to get dealt with very quickly and in some cases confidentially. One of the largest settlements was around an age discrimination issue related to mandatory retirement and the firm having that mandatory requirement across the entire practice. That's a pretty obvious age discrimination issue and that didn't sit very well with anyone at the Department of Justice, EEOC level. So that became very expensive, very quickly. We are seeing Equal Pay Act claims jump up. The lead plaintiff attorney in that area is very good at going to the press with \$100 million demands, which focuses everyone's minds. We've seen large sexual harassment issues in the past. Again, they seem to be driven by the firms wanting to keep themselves out of press, reputational issues are key. We've also seen cases where the alleged harasser is a rainmaker at the firm and that becomes a difficult situation because the firm are very protective of their key asset as they are a big revenue driver. If there is some merit to the allegations then that becomes problematic because as an insurer you've got to try to settle something that is potentially expensive. Also, we like to see some kind of remediation, some remedial action towards that harasser and that's not always carried through because of the fear of losing someone so financially valuable. Wrongful termination issues were mainly towards the claims we saw coming out of the post-recession era, when the partners were being de-equitized. They can be quite expensive because you are dealing with very high earners. Any kind of claim will use earnings as a proxy to building a settlement value and that just drives the numbers up high.

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OUR POLICY HAS THE OPTION OF COMBINING EPL AND ML COVERAGES, WHICH WE ALWAYS BELIEVE TO BE BENEFICIAL. WHAT DO YOU SEE IS THE MAIN BENEFIT OF COMBINING THE LINES AND HAVING THEM IN ONE PLACE?

A

WI: The main benefit is the fact that most of these claims, especially if they are EPL related, will potentially include allegations against the management of the firm for failure to enforce an adequate work environment. These types of claims straddle both EPL and Management Liability because it is being alleged that the firm's management are not controlling or managing the firm in a way that gives the employees protection. So yes, it may be the run of the mill kind of harassment and discrimination allegations, which triggers your EPL coverage. However, once it starts to move into the failure to control and failure to provide a safe work environment and working the way it should be. Then that starts to become a management issue. If the management committee or executive committee, managing partner, or whoever is running the firm, is not reacting in the way that you'd expect. They are not providing that protection or providing the policy/procedures that help create a safe environment, then that starts to morph into a Management Liability issue. So, if you are going to have claims that potentially impact both towers of coverage; having them on a combined basis, with one carrier, makes it a whole lot easier to handle the claim. You then avoid the issue, of having two claims managers, at two separate carriers, pointing at one another saying 'I think it's more of a ML Claim' or 'I think it's more of an EPL Claim'. Trying to agree on an allocation between the two can be problematic, so it's far easier if it is combined with one carrier.

In summary, it is clearly advantageous for a law firm to work with a specialist insurer and broker that has the right background and experience to ensure not only that the broadest coverage is in place in the event of a claim but also to take advantage of the risk management services that come along with these policies to improve the future risk profile of the firm.



About Wayne Imrie
Management Liability Underwriter
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Wayne joined Beazley in August 2006 as a member of the Management Liability team. He is responsible for underwriting various ML coverage lines including Directors' & Officers', EPL, Fiduciary and Wages & Hours. He has over 20 years' experience in the insurance industry, having held roles in broking, claims and underwriting.

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