December 2015

THE BETTERLEY
REPORT

EMPLOYMENT PRACTICES LIABILITY INSURANCE MARKET SURVEY 2015:

Joint Employer Exposures Concern Insurers

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Highlights of this Issue

- Rates for Other Insurance Lines May Be Softening, but Not for EPLI
- MarketStance Reports on Volume and Growth Opportunities
- New Insurer Added to EPLI Market Survey
- Peter Taffae Writes about the Impact of the Regulator's New Position on Joint Employers and EPLI

Next Issue

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Technology E&O Market Survey

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Editor's Note: *In this issue of The Betterley Report, we present our annual review and evaluation of the changing employment practices liability market. We identified the leading insurers and key differences in their offerings, as well as evaluated the state of the market—how healthy is the line, whether it is growing, and what the claims experience is. In particular, we focused on rate and retention trends.*

This issue reviews products from 30 insurers that form the core of this market, having added FranchisePerils, a specialist in the franchise industry. We removed ABA at their request; that program is now supported by two different insurers, making it complicated to fit into our format. Berkshire Specialty's new product would have been added, but at the time of publication, its forms were not available. We anticipate that they will be available in the marketplace soon and will be included in our 2016 employment practices liability insurance (EPLI) Report.

Recently, the exposure of a so-called joint employer has become much more concerning than previously. This exposure changes the risk for franchisors, who until recently were shielded from allegations that they share in the employment responsibilities of their franchisees. We now include a new table titled "Joint Employer Coverage Detail" (discussed later in this Report).

Because of the importance of this new exposure and coverage, we asked industry expert Peter Taffae, president of FranchisePerils, to author the accompanying article, "What Does Joint Employer Mean to EPLI?"

EPLI coverage can also be found in management liability insurance packages. Readers may wish to read our "Private Company Management Liability Market Survey (August 2015)", which reviews so-called management liability products that can, and usually do, include EPLI.

Again this year, we have added commentary on the size and growth prospects of EPLI by insurance demographics and economic experts MarketStance. Their data is much more refined than (but consistent with) ours, and so it is a real addition to our Reports to include their insight. www.marketstance.com

While each insurer was contacted in order to obtain this information, we have tested their responses against our own experience and knowledge. Where they conflict, we have reviewed the inconsistencies with the insurers. However, the evaluation and conclusions are our own.

Rather than reproduce their exact policy wording (which can be voluminous), in many cases we have paraphrased their wording, in the interest of space and simplicity. Of course, the insurance policies govern the cov-

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erage provided, and the insurers are not responsible for our interpretation of their policies or survey responses.

In the use of this material, the reader should understand that the information applies to the standard products of the insurers and that special arrangements of coverage, cost, and other variables may be available on a negotiated basis. Professional counsel should be sought before any action or decision is made in the use of this information.

Introduction

We have been closely following the employment practices liability insurance (EPLI) market since 1991. In the beginning, there were 5 insurers; now, there are perhaps 50–55 insurers active in the stand-alone market. While there are other insurers offering stand-alone EPLI, they represent (we believe) only a small portion of the market. In addition to the stand-alone products, add-on coverage to package products (businessowners-type policies) are available but appear to be limited to smaller employers, as insurers recognize the importance of underwriting and claims expertise as vital to EPLI success.

For our survey, we focus on the most prominent insurers writing the most business, or those that offer some unique product or service. While this omits some insurers, we believe that it makes the information more useful to our readers.

To test whether we were covering the key insurers, we have reviewed the list with some of the most prominent observers of the EPLI market, who have confirmed we did not omit any significant insurers.

State of the Market

Rates and Retentions

Rates continue to drift up, although there is resistance from competing insurers. Incumbent insurers want (and often need) higher rates, but insurers that would like to steal customers away are willing to forgo an increase to gain a customer. This works to block the rate increases that are probably needed by many insurers. Still, rates do rise, as not all insureds get a competing quote when faced with an increase, and of those that do, many will accept a small increase rather than change insurers.

Although these increases are not dramatic, they do represent a departure from the flat rates in most

Insurers in this Survey

The full report includes a list of 30 markets for this coverage, along with underwriter contact information, and gives you a detailed analysis of distinctive features of each carrier's offerings. Learn more about *The Betterley Report,* and subscribe on IRMI.com.

other property and casualty lines. California has been particularly hard hit with losses and is yet again a state in which employers are finding reasonably priced EPLI hard to obtain.

In the table below are some of the (not for attribution) insurer responses when we asked them their view of EPLI rate trends. It shows the diverse range of responses to a market that needs higher rates but has difficulty obtaining them because competitors are willing to gain market share through price competition.

Finally, retentions (meaning deductibles or self-insured retentions) show somewhat more consistency among the commenting insurers. We saw no evidence of movement either way in retentions. The trend was flat, except (of course) in California, where the trend is up.

Volume

EPLI has been a mature market for many years, with no growth in the United States despite rate increases. The private company management liability product line has probably absorbed some of the premium that used to go to the monoline EPL product, but there are still many too many smaller employers that don't buy EPLI—and should.

The volume of business (gross written premium) for 2014 is stable at $1.720 billion, essentially unchanged, according to MarketStance, a respected source for market demographic, insurance, and eco-

Sample Insurer Responses When Asked about EPLI Rate Trends

Insurer Position in the EPLI Market	Insurer Market Focus (employer size)	Rate Trend	
		Market in General	Own Rates
Large	All	Flat	Not stated
Larger	All	+5%	Flat
Mid-range	All	Primary layers: flat to slight increase Excess layers: reductions	Same
Mid-range	Small- to Mid-sized	+4%	+6%
Moderate	Small- to Mid-sized	Not stated	+4%
Smaller	Small- to Mid-sized	Flat	Slight increase
Smaller	Small- to Mid-sized	+5%	+2%

nomic information for the commercial property-casualty industry. This despite insurer efforts to strengthen rates and an improving economy.

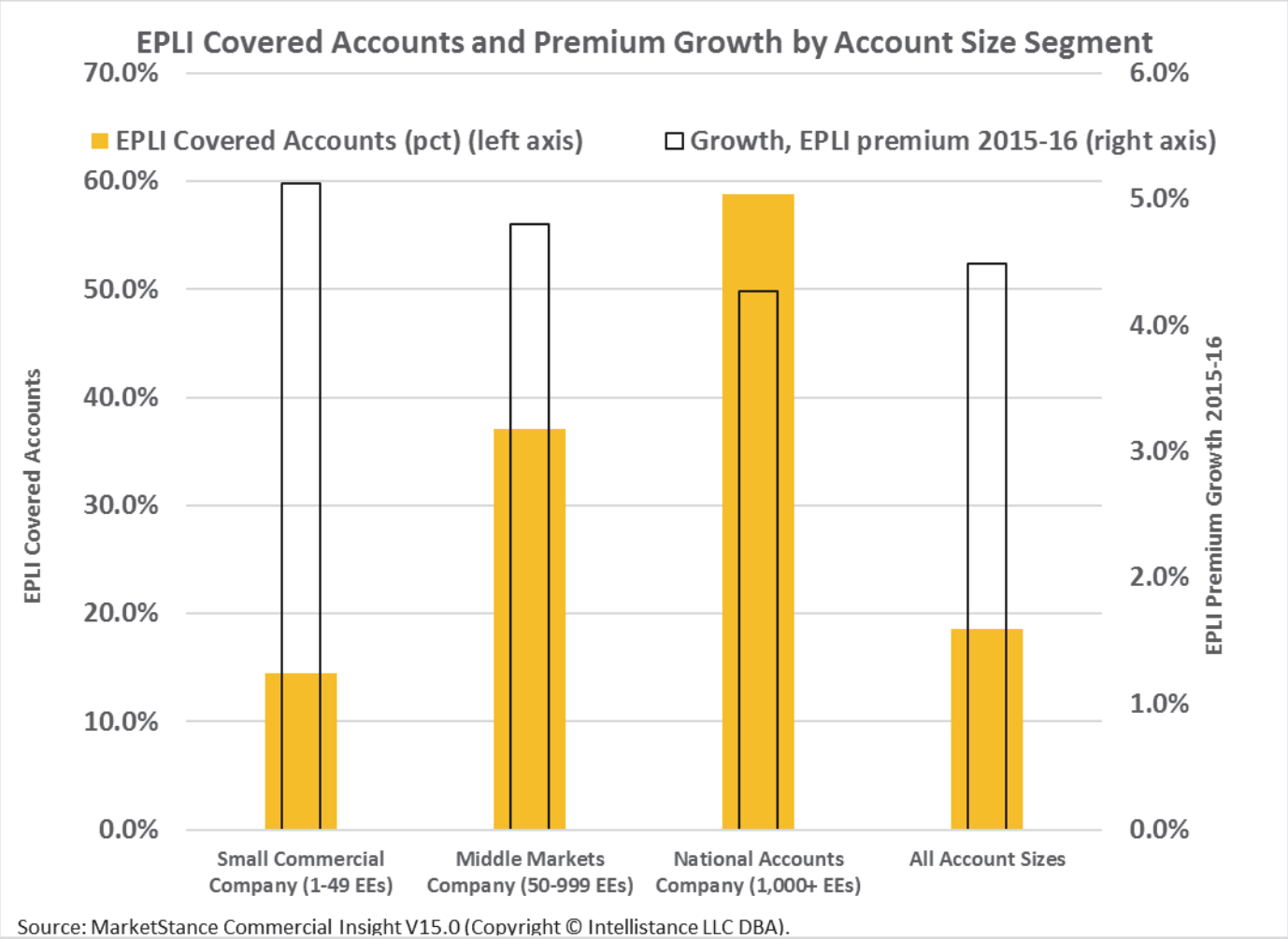
Thinking about 2015, rate trends and possibly growth in market penetration and employment might move the annual premium up to as much as $1.75 billion. We expect the 2016 numbers to be similar, despite slightly increasing rates and improved employment.

This does not seem to make much sense—higher rates plus increased exposure base should generate higher gross written premium. So how to explain the lack of substantial growth?

We think it is from the continuing movement of EPLI premium from stand-alone policies to packaged management liability policies (our August *Report* reviews that line of coverage).

So who is buying EPLI policies? We asked MarketStance to review employment sectors and how much EPLI premium they generate.

Premium growth for 2015–16 averages 4.5 percent for all size accounts. See the chart below for

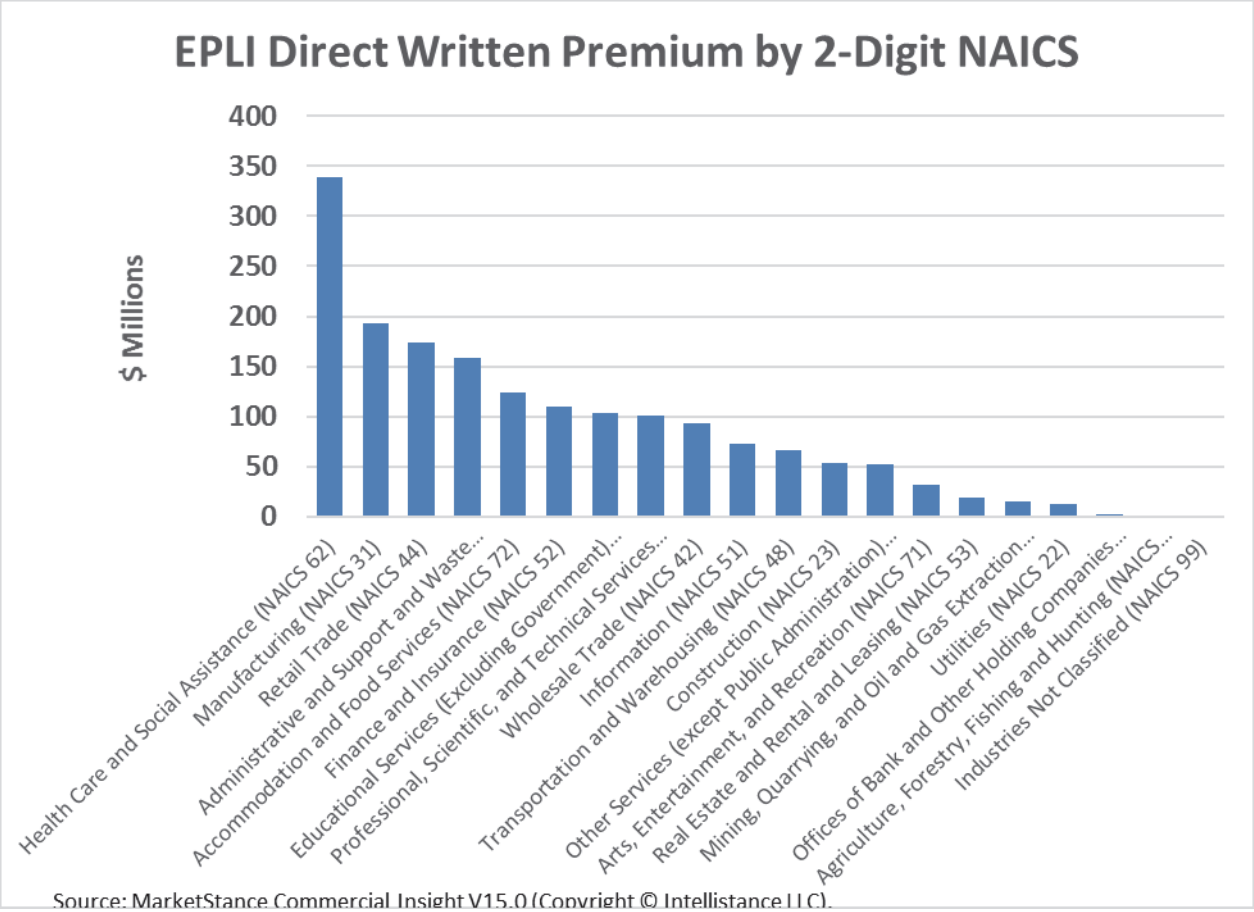


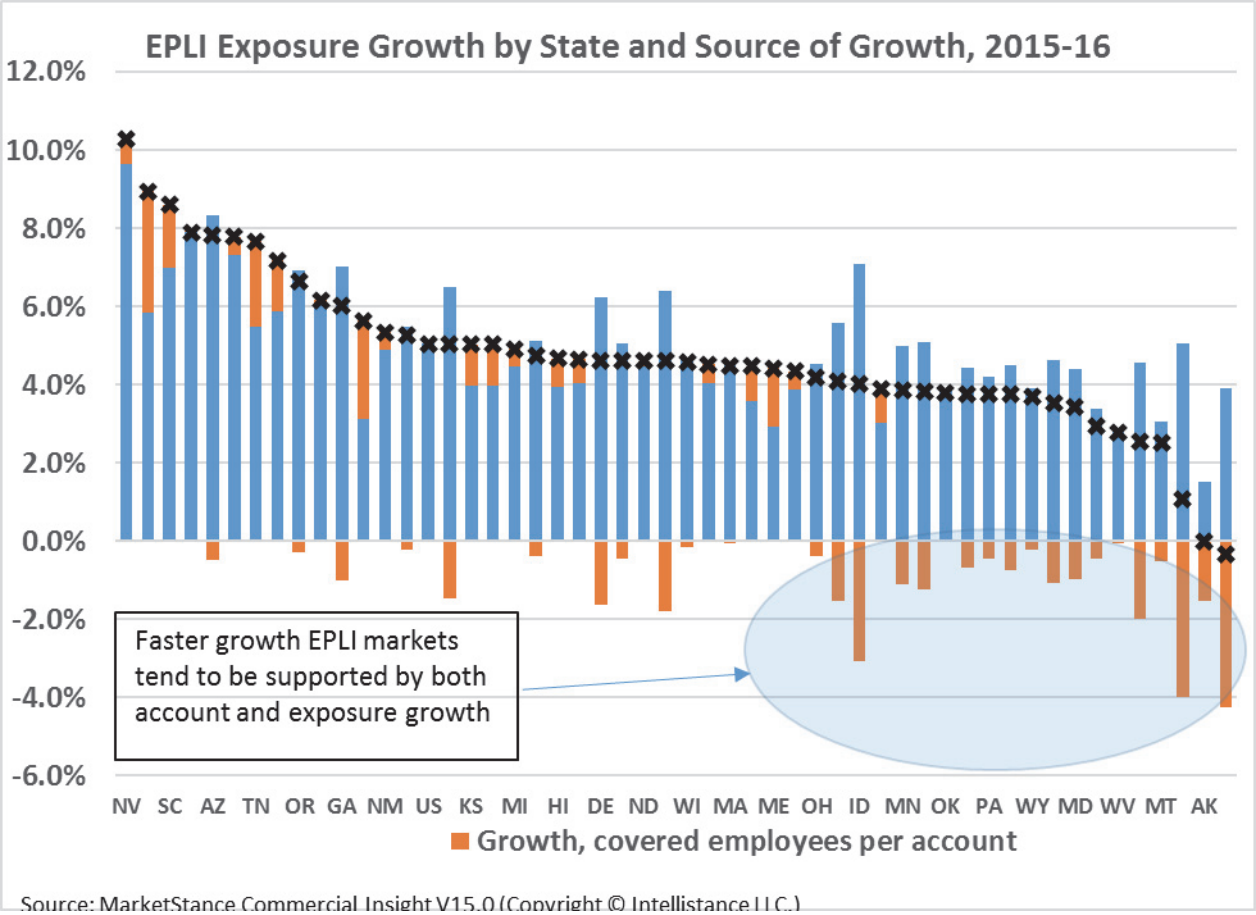
the breakout by account size segment and the contrast to the percent of covered accounts by size category. EPLI growth opportunities are apparent in all but the 1,000 + employee segment.

According to MarketStance, the Health Care and Social Assistance—North American Industry Classification System (NAICS) 62—sector continues to lead the pack with almost 20 percent of the total EPLI premium volume—Manufacturing, Retail, Administration & Support, and Accommodation & Food Services round out the top 5, as seen in the chart at the bottom of this page.

The chart on the next page demonstrates the components of exposure growth by state. Slower growth markets tend to manifest declining exposures per account. Consequently, marketing plans for markets on the right side of the chart might differ significantly from those on the left side. The "x" indicates the net growth rate.

Market penetration is still very low for small commercial accounts. It is really unfortunate that so few small commercial insureds buy EPLI coverage. We suspect that they continue to not realize the potential size of a claim, don't think their employees





will bring suit, and believe that they can't afford the premium.

Economic growth and its (hoped for) accompanying increase in employment brings with it the potential for increased premiums. That is true only if the industry can achieve rate adequacy and bring on new insureds.

We note that premiums charged to an individual insured often are not adjusted for increases (in head count). Insureds tend to resist an increase in premium even when it is logically appropriate due to higher employment levels (more employees = more chance of a claim is the theory if not the actual practice).

With this level of potential growth, it's important to pay attention to every corner of growth opportunity. And while it might be important to focus on large EPLI premium states such as New York, California, or Texas, which have significant base premium and expected growth, smaller base premium states also present significant opportunities.

Claims

The Betterley Report continues to focus on products, not claims, but we keep our ear to the ground on claims as they affect coverage, pricing, and availability.

The frequency of claims continues to be costly for underwriters. Insureds have had more covered claims than expected, combined with increasing defense costs. This has increasingly been met by some insurers with mandatory higher deductibles.

There are two problem areas of claims: mass claims and wage and hour claims.

Mass (also called multiple plaintiff) claims, where brand-name companies are targeted by multiple plaintiffs that threaten coercive action unless the defendant settles quickly, are a big problem for insurers writing large companies. Insurers have seen some very large settlements for claims that employers would not fight, fearing reputational costs more than the costs to settle. These claims have made it difficult for brand-name companies to buy EPLI coverage at the costs they would like.

Insurers that have a lot of experience with these types of claims use a variety of tools.

Some report mandatory deductibles of $1 million+, and coinsurance of 10-25%, for such insureds. Other insurers include policy language that applies the deductible to each claim, rather than a single deductible for the group of claims. The leading insurers are very firm in requiring large retentions for mass claims.

Insurers focusing on smaller- to mid-sized employers have not seen mass claims as a problem (since most of their insureds are not as vulnerable to the pressure of such claims) and generally have not applied any special restrictions. However, they are encountering more wage and hour claims than expected. These are brought by employees alleging that they were not paid for all of the hours they worked or that they were not paid the correct wage. This can add up to a very expensive claim, when multiplied by all of the affected employees.

Target Markets

Insurers continue to be interested in most types of insureds, with the significant exceptions of employee leasing and temporary staffing, auto dealers, law firms, casinos, educational and healthcare institutions, and religious and public entities (which have specialty markets available).

Few insurers avoid specific states, unless they have not yet been approved to write business in a particular state. California is often cited as a challenge (insurers requiring larger deductibles, for example), but it is such a large market that it can't easily be ignored.

Insurers also identify states in which their product may not be available due to regulatory restrictions, but since these can change, it is better to inquire of the insurer before rejecting it as a possible market.

Limits, Deductibles, and Coinsurance

Total capacity in the market, using US, Bermuda, and London sources, looks to be about $500 million, although there are reports of as much as $800 million. This is achieved by buying excess layers, of course. These layers may not be coming from other EPL insurers but rather are bundled into super-layers that include other coverages (such as excess umbrella, errors and omissions, and others).

As noted earlier, deductibles and self-insured retentions are flat, which we think is a healthy sign for the line. Deductibles were, in our opinion, often too low and required insurers to pay for relatively frequent and non-catastrophic claims. We generally think it is better for both the insured and the insurer to avoid covering routine claims.

Coinsurance? Insureds can reduce premiums by assuming a percentage of each loss, but we haven't seen that happen in years and don't expect to in the near future. For very large employers, coinsurance might be a good way to share in the loss for appropriate savings (as they sometimes do for mass claims).

In past *Reports,* we have commented that most small- to mid-sized insureds select deductibles that are too small, which can lead to pressure to increase premiums upon renewal. The market has pushed those deductibles higher, which in the long run will be helpful to holding premium rises in check. Still, it is tough on the insureds and their brokers when a market that used to offer a $2,500 deductible pushes the minimum to $10,000 and then the next year to $25,000 (which one reader experienced).

Sample Pricing

We asked insurers to price out several sample applicants, using the following assumptions.

- 5,000 employees, $10 million limit, $100,000 deductible
- 500 employees, $5 million limit, $25,000 deductible
- 250 employees, $1 million limit, $25,000 deductible
- 100 employees, $1 million limit, $10,000 deductible
- 50 employees, $1 million limit, $2,500 deductible

We asked them to assume a "typical" insured, "typical" state, and no particular underwriting issues (problems). Prior acts coverage was to be included.

The results are shown in the "Typical Premiums" table attached.

Only a few insurers provided this information; others expressed reservations about their ability to sample price, since too many factors enter into the pricing equation. While that is a good point, we find that employers and their risk management advisers are hungry for information about price ranges, and offer it here. If we don't get better participation, it may be time to remove this table from the EPLI *Report.*

Please be cautious in using this information. Although it is a guide to the price competitiveness of an insurer, it is easy to be competitive when quoting a theoretical applicant. Also, individual insurers may be more or less competitive in a particular state or industry. Use the table as a guide to typical pricing, not as a reason to reject an insurer as too expensive.

Typical Limits

As an indication of the maturity of this market, we are more often asked about the typical limits purchased by insureds and less often about which types of employers buy coverage. Most insurers provided useful information about the typical, high, and lower limits purchased by the insureds.

Since limits often equate to the size of the insured, we specified employers ranging from 50 to 25,000 employees. The results are summarized in the attached table "Typical Limits." The answers are merely an indication of the limits insureds select and should not be used as a guide to sufficient limits.

To us, this table provides continuing evidence that many employers do not buy enough limits and seem content to have insurance, even if it is inadequate.

Special Coverages

Several special coverages are becoming more necessary, so we asked for specific information and included the responses in the table "Special Coverages and Cost."

Punitive Damages Coverage

We asked insurers for information about coverage for punitive-type damages and/or intentional acts in states where there may be a restriction of coverage imposed on the insurer. Our intent was to elicit information about most favorable venue–type wording (also called "choice of law") and offshore wrap policies.

Coverage for either punitive damages or intentional acts can be prohibited by states, either by regulation or on a theory that such coverage is contrary to public policy (or both!). Almost every insurer offers separate coverage to fill in such potential gaps in coverage, either via most favorable venue wording or with an off-shore wraparound in a jurisdiction such as Bermuda that does not frown upon such coverage.

Several insurers are reluctant to disclose that they offer such coverage, fearing that regulators might attack their offshore solutions. We understand that there are 16 states that prohibit or restrict coverage for either punitive damages and/or intentional acts, including New York, Ohio, Florida, and California. Such additional coverage is vital in those states.

Most insurers have most favorable venue wording, at least as an option, but be cautious about insurers that simply answer "where insurable," as the whole point of this coverage feature is to remove the uncertainty.

Wage and Hour Coverage

The biggest concern continues to be coverage for wage and hour claims, including Aon's product for larger insureds, which we wrote about in our 2012 *Report*. Lawsuits alleging improper payment of overtime wages have been very much in the news the past several years. Employees classified as exempt and therefore not owed overtime have been able to bring (sometimes) successful claims that they are in fact owed overtime. Prominent class action lawsuits have created huge legal bills for the targeted employers.

Are wage and hour claims covered in a typical EPLI policy? It is not always clear whether or not wage and hour claims are covered in a typical EPLI policy, and our participating insurers are reluctant, in many cases, to provide definitive information. Generally, it seems that a wage and hour claim that involves other covered allegations will at least get the insured a defense.

Because of this uncertainty, we now ask insurers for definitive information about this coverage (or lack thereof); their responses are in our "Special Coverages and Cost" table.

Wage and hour should be insurable for small- to mid-sized employers. We think there are many instances where the violation was unintentional— not caused by an employer trying to deny its employees a just compensation. While we do not believe that insurance should step in to pay for compensation found to be owed to the employees, nor to pay for related governmental fines, multiplied damages and attorneys' fees could be covered.

Third-Party Liability

Coverage for suits brought by third parties, such as customers, continues to draw attention. Although early coverage forms applied to discrimination only, more now apply to both discrimination and harassment. All insurers can include third-party coverage in 2015.

Not all coverages are alike; some insurers restrict the coverage to business relationships, which is not unreasonable, and may limit harassment coverage to sexual harassment, which may not be as reasonable.

Workplace Violence

Few insurers offer it, and we don't see much demand for the cover, despite the awful events that are too common. We believe that employers don't see workplace violence as an insurance issue.

Joint Employer Coverage

This table (new for our 2015 *Report*) summarizes each insurer's position on its coverage for joint employers and can be important, especially when an insured is a franchisee or franchisor. It can also be important when there are contractor/subcontractor relationships and when the insured is engaged in employee leasing.

The table asks whether the policy includes coverage for joint employers (either automatically in the policy or as an option). It then provides information as to whether the coverage is subject to a sublimit.

The need for joint employer coverage is relatively recent and only applies to specific employer sectors. However, we would not be surprised to see a wider need as politicians and regulators seek to bring employment protections to nontraditional job relationships.

For more detail on joint employer issues, please read Peter Taffae's article in this *Report.*

Who Is an Insured and Definition of Claim

As with definitions of coverage, this area has also shown a real convergence of approach, with less coverage distinction between insurers. For example, all insurers cover employees, although some specifically include seasonal or temporary employees in their definition. This raises a question: if an insurer covers employees without limitation, does it need to

specifically include seasonal or temporary employees? We think specific language is preferable.

Leased and contract employees may need coverage; a number of insurers extend coverage to these individuals if they are indemnifiable like employees.

Providing coverage for part-time, seasonal, or temporary employees would seem to be wise. Including the employee defendant in the defense of the claim might help reduce the risk that he or she will attempt to blame the employer in order to get released from the claim.

Newly acquired organizations is one area in which insurers differ, and subsidiaries is another. Generally, we find less distinction between insurers than before.

What is a claim, for the purposes of triggering coverage, is important. Insurers are generally similar in approach, including written demands, administrative processes, and arbitration. Oral demands are covered by some.

Definition of Coverage

The definition of coverage remains vitally important to the quality of the policy, but it is getting increasingly difficult to distinguish between insurers. The key sources of claims are covered well, and it is only by subjecting the policy wording to microscope-level analysis that we can distinguish differences.

Most policies now contain all-inclusive wording that eliminates the need to enumerate perils. Insurers now frequently broaden their coverage by including language such as "and other protected classes." This is a benefit for the insured and makes the need to compare lists of perils less important.

In general, we would encourage insurers to reduce the number of words and definitions they use and use more all-inclusive (all-risks) wording. In the definitions of coverage, we are seeing more "all-risks" wording and view this as better for both the insurer and the insured.

In analyzing coverage for this article, we struggle with how best to present our findings. On the one hand, we would like to list the covered items and then identify whether all-inclusive wording is included (this is the approach used this year). Both insurers and readers seem to like a list of covered items.

On the other hand, if all-inclusive wording is becoming prevalent, then listing items just takes up space.

Claims Reporting and Extended Reporting Period

How soon a claim has to be reported is an important distinction between policy forms. Most insurers require the named insured to report "as soon as practicable," which seems reasonable. In practice, unless the insured has delayed reporting so long (and irresponsibly) as to compromise the defense of the claim, there is little practical difference between insurers.

Not all policies are as generous when it comes to claims reported after the expiration of the policy. Some, for example, require the claim to be reported

before the expiration, while others have an automatic extended reporting period (ERP) of up to 90 days.

An important distinction between insurers involves the interpretation of when an event is actually a claim under the policy. Is a comment by an employee that he or she is dissatisfied with his or her treatment a claim under the policy? Many insurers treat the notice of an event that is likely to become a claim as an actual claim under the policy, which can be important for insureds that are changing insurers or dropping coverage.

ERP protection is an underappreciated feature of EPLI policies, one that will take on a growing importance if insurers lose interest in the market. We note that many insurers have shortened up the length of ERP they are offering.

All insurers offer an ERP, but length and cost differ. The shortest minimum period in our survey was 6 months. A variety of insurers offered at least 1 year, with 3 or more years available. Several insurers report that the ERP is negotiable in term and cost, which is dangerous for the insured. Make sure that this negotiation takes place *before* the insurer loses interest in your EPLI business.

A long ERP could be enormously valuable should the EPLI insurer decide it does not want to continue offering this line of coverage (though we don't expect such a development).

Selection of Counsel

In previous years, we have been vocal in our criticism of insurers that do not allow the insured a voice in the selection of counsel. We believe that the relationship between counsel and client is a precious one, as trusting as the bond between patient and doctor.

At the same time, we agree with the concern of insurers that unqualified legal representation cannot be allowed and that control over fees is necessary in a line like EPLI. Indeed, one insurer has told us that the primary reason it is reluctant to enter the smaller employer market is its belief that such employers often use improper counsel and take employment actions without legal advice.

Therefore, we are pleased to report that, while most insurers continue to control the selection of counsel, almost all are very flexible in allowing the insured to select or approve counsel. If the insured requests specific counsel approval at the right time (during proposal negotiations), the insurer is likely to approve the insured's choice.

A few insurers offer the insured a choice of an indemnity policy, which allows the insured full control over selection of counsel. While some dispute our attraction to indemnity policies (since an uncovered allegation may not be defended by an indemnity policy), we still think control over counsel is of enough value to make indemnity policies worth consideration.

Note that the insurers that are primarily interested in larger employers are more likely to give selection of counsel to the insured; insurers that specialize in smaller insureds are less likely to be able to invest the time necessary to approve special counsel requests, since they are charging correspondingly less premium. However, in our experience, insurers are general-

ly willing to allow the use of the insured's choice of counsel, as long as they are clearly qualified. For the insured that asks, even the smaller insurers are willing to allow selection by the insured.

We regularly get calls from EPL defense law firms that are finding that insurers are no longer willing to retain them, as they restrict more and more of their work to existing panel members. These may be qualified attorneys with a good record of successfully guiding clients to a resolution. As the EPLI business matured, insurers needed to reduce the number of law firms that they worked with and ideally reduce cost. This has unfortunately left many competent attorneys on the outside looking in, wondering whether they will continue to be able to represent their clients.

We find that many insurers are willing to approve use of the insured's preferred counsel, *especially* if that agreement is reached while the insurance policy is being purchased (or renewed). Insureds should not wait until they have a claim in hand before requesting approval of their preferred counsel.

Consent To Settle

Insurers are still reluctant to allow insureds much control over settlement, understandably, since EPL suits often involve a good deal of emotion. Both employer and employee are often willing to continue their fight in court long after it makes economic sense to settle. Insurers are reluctant to fund such battles, of course.

The so-called hammer clause allows an insurer to limit its claim payment to no more than the amount it could have settled for plus defense costs. This protects the insurer against a "litigate at any cost" insured, while protecting the employer against a "settle it, who cares about the precedent" insurer.

The hammer clause causes both insured and insurer some unhappiness; so-called soft hammer clauses exist, which share the cost above the claim between the insurer and the insured. Originally offered by Royal, it is now a feature of many insurers' products. Please see our table "Claims Reporting" for specifics.

Most insurers will not force an insured to settle but are free from any additional cost (settlement or defense) obligations. A few policies continue to allow the insurer to settle without the insured's consent, which is very dangerous to the employer. In practice, if the insured has a good reason to continue the defense, insurers will not enforce their hammer clause.

Prior Acts Coverage

Prior acts coverage is a very valuable protection that used to be difficult to obtain. Underwriters were reluctant to insure the prior activities of an employer, anticipating that only those organizations that needed coverage would buy prior acts protection.

This ignored the reality that the EPLI exposure is one that all employers confront and that even the best managed risks still needed coverage. Just because an insured wants prior acts coverage doesn't mean it is a higher-than-average risk.

As insurers competed to take business away from other insurers, though, they were forced to offer prior acts protection, because of course EPLI is

written on a claims-made basis. As they became more comfortable with the risk of a prior act, it became easier to offer the coverage even to new insureds. In fact, for many insurers, there is no additional cost for prior acts coverage.

So, we now see insurers reporting that they include prior acts in their standard coverage, with the option of limiting the exposure *via* retroactive dates. Even those that do not include it in their standard form can include it by endorsement.

Territory

Coverage for events that take place outside of the United States, Canada, or related territories is more important for insureds than ever. All policies reviewed offer worldwide coverage for suits brought in the United States or Canada and territories. Most insurers also offer the option of true worldwide coverage (suits brought anywhere).

Risk Management Services

Finally, our tables describing various risk management services identify the types of value-added services offered by EPLI insurers. These services are particularly appropriate for EPLI, offering the same type of benefit to the insured that, for example, loss control engineering does for property insurance.

Value-added services is a primary source of product innovation in the EPLI business and one in which numerous vendors, including law firms, are competing for business. Several insurers have reported enhanced services and/or are offering them to more categories of insureds. In particular, insurers are favoring vendors that actively reach out to the insureds to encourage their use of these services.

Why?

In the past, it seemed there were two types of insurers—those that encouraged the use of risk management services and those that took a "tick the box of product features" approach. The former believed that services improve the quality of the risk and improve the stickiness of the account relationship. The latter really didn't care whether the services were used and didn't want to pay more than the minimum to satisfy the broker and the insured.

It seems to us now that more insurers subscribe to the quality approach. We have spoken with many insureds that value the services benefit at least as much as they value the insurance benefit (risk transfer).

Last year, we expanded our research about these services to better recognize the differences between them and, we hope, to help insureds and their advisers understand the scope of what is being provided.

We now provide four tables of information.

- Risk management services included
  - Risk management self-audit so the insured can assess its EPL practices
  - Employment-related consultations (typically by an attorney)
  - An anonymous employee whistleblower service
  - Sample or template employee handbooks
  - Training courses or materials

- The types of consultation services that can be included
  - Human resources practices
  - Legal and regulatory issues
  - Whether the topics must be those typically covered by an EPLI policy
  - Who provides the services (attorneys, HR consultants, or paralegals)?
  - How often the services can be used
- Training and education services
  - How many are offered?
  - Do they qualify for continuing education credits?
  - Is usage tracked by the provider?
  - Is usage reported to the insurer?
  - How many courses can be taken?
  - So the courses meet state training mandates
- Outreach
  - How does the insurer inform the insured and the broker that the services are available and encourage their use?

Summary

EPL is a strong but mature business in the United States, with little in the way of growth opportunities for the line in general. Opportunities exist in expanding the purchase of coverage by smaller employers, whether through a monoline policy, as a part of a management liability package (with directors and officers), or added to a businessowners-type package. For insurers with capabilities beyond the United States, foreign expansion of coverage is likely to be a good opportunity for growth in premium and diversification.

Insurers would like to achieve higher premiums to cover the unsustainably high level of claims by raising rates and deductibles, as well as by implementing further controls on the cost of defense. But competition from other insurers and the insureds' resistance to these increases make this difficult to achieve. Will the EPLI market be able to obtain higher rates? Hard to say, but it will be difficult.

Costs for defense are escalating as cases become more complex; insurers are trying different methods of managing these increases, such as bringing routine claims in-house, making defense panels smaller, and putting further cost restrictions on attorneys. To some extent, controls on billing rates are being negotiated as well.

Defense firms are responding to this in a variety of ways, including fixed-fee billings for certain types of claims; we expect to see more of this in the near future. There seem to be more attorneys interested in EPLI defense work than there is work available. How the legal profession and the insurance industry respond to this challenge over the next 5 years will be fascinating.

EPLI value-added services remain an important part of the product when done right, offering employers access to tools that can truly make a difference in the frequency and the severity of claims—as well as the bad feelings that accompany employee/employer disputes.

All in all, EPLI remains an exciting product line, having realized its potential of being a coverage found in the portfolio of most employers. Managing its profitability remains its biggest challenge.

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About the Author

Richard S. Betterley is the president of Betterley Risk Consultants, an independent insurance and alternative risk management consulting firm. BRC, founded in 1932, provides independent advice and counsel on insurable risk, coverage, alternatives to traditional insurance, and related services to corporations, educational institutions, and other organizations throughout the United States. It does not sell insurance or related services.

Mr. Betterley is a frequent speaker, author, and expert witness on specialty insurance products and related services. He is a member of the Professional Liability Underwriting Society and the Institute of Management Consultants. He joined the firm in 1975.

Mr. Betterley created *The Betterley Report* in 1994 to be the objective source of information about specialty insurance products. Now published six times annually, *The Betterley Report* is known for its in-depth coverage of management liability, cyberrisk, privacy, and intellectual property and media insurance products.

More recently, Mr. Betterley created *The Betterley Report Blog on Specialty Insurance Products,* which offers readers updates on and insight into insurance products such as those covered in *The Betterley Report.* It provides him with a platform to more frequently and informally comment on product updates and newly announced products, as well as trends in the specialty insurance industry. www.betterley.com/blog

What Does Joint Employer Liability Mean to EPLI?

Until relatively recently companies could easily protect themselves from being brought into a joint employment matter by avoiding the exercise of direct control over their employees when relying on staffing agencies, general contractors and franchisors. This was not only good risk management but also just good business as companies wanted to transfer employment issues. A recent National Labor Relations Board (NLRB) ruling has removed much of that protection, with deep implications for EPLI policies.

Background

The NLRB is the agency that regulates and implements the National Labor Relations Act, the act that covers labor laws. Under the Reagan administration, the Board defined what constitutes a joint employer. The "standard" focused on the degree of control. To be considered a joint employer, there must be **direct control** over operations, hours, working conditions, and the like.

The landscape of joint employment liability has drastically changed as the NLRB recently ruled that joint employment would be determined on a case - by - case basis. In Browning – Ferris Industries of California, the NLRB overturned a standard that had been used for over 30 years. The new NLRB "standard" is that the company needs only to assert **"indirect control"** over the terms and conditions of employment, to be found to be a joint-employer. Now, 'employers' that use staffing agencies and/or independent contractors and/or franchisors have EPL risk that they did not have before.

It gets worse - McDonald's has now been charged by the NLRB as a joint – employer, based on the new NLRB standard. The NLRB has pointed to McDonald's comprehensive computer systems, which tracks labor usage and costs, as one of the ways it controls the franchisees operations.

Implications for Joint Employers, Including Franchisors

This means that franchisors will not know for sure if they have inadvertently created joint employment status for themselves, unless and until an action is brought against them. This NLRB decision jeopardizes the risk avoidance strategy most franchisors employed and increases their potential liability beyond what can be reasonably measured.

Standard Employment Practices Liability policies are not designed to cover joint employment matters. One only needs to review the definition of Insured. For example, Company A hires Company B to manage its employees. An employee of Company B sues Companies A and B. Company A has to demonstrate it had no "indirect control" over Company B's employee (even though Company B employee was based in Company A office). This is also true for a Franchisor (company A) and its franchisees (Company B).

The NLRB has the power to influence the Department of Labor and other federal agencies that

cover employment law. This has many worried. Many carriers are trying to decide if they need an overt exclusion or if being silent will allow them to avoid being pulled into joint-employer litigation. This is especially true with EPL for franchisors. I expect that as this issue comes to the forefront we will see a proliferation of joint employment exclusions.

What Should a Presumed Joint Employer do to Protect Itself?

Franchisors should ask if their carrier is willing to provide coverage for joint employment matters to address their exposure to EPL suits against the franchisee that names the franchisor as well. Franchisors should also require franchisees to carry EPL coverage if they do not already and require their franchisees to name the franchisor as an additional insured on their EPL policy. This exposure needs to be addressed at both the franchisor and franchisee level. Franchisors should also reexamine the EPL limits they carry and the limits of their franchisees to see if would be prudent to purchase additional limits in light of this increase in exposure.

While the risk to a joint employer is large, it can and should be addressed through insurance and proper employment practices risk management (in some situations less control might be advantageous, but there are other business ramifications beyond risk that need to be considered). The best advice is for companies to consult with both its outside counsel and its insurance advisors with specific EPL and franchisor liability experience to determine the best course of action.

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