



Complete the picture

A spotlight on the United States Employment Practices Liability Insurance Market

September 2014



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Complete the picture

A spotlight on the United States Employment Practices Liability Insurance Market

Corporations in the United States (US) that employ staff are likely to have suffered an employment practice claim from an employee, vendor, customer or other protected class.

And if they haven't, they are likely to do so.

Regardless of a company's revenue, employee count or corporate structure, the likelihood of suffering an employment practice claim is high – and rapidly rising.

Companies with as few as 100 employees can expect to receive an employment practices claim once every three years, according to the 2012-2013 Edition of Jury Award Trends and Statistics, published by Westlaw.

And the probability of the plaintiff winning a case at trial stands at 51 percent, as illustrated by Westlaw.

Ongoing developments at the US Equal Employment Opportunity Commission (EEOC), in court decisions, and in state and federal legislatures, are steadily expanding exposure.

In addition, the increased reliance on the Internet and social media has opened new avenues for employment liability-related risk that are particularly difficult for employers to manage.

The insurance market's solution to the risks, Employment Practices Liability Insurance (EPLI), is a relatively mature product, offering broad coverage at a competitive price. There is a lot of publicly available information on employment practice law and claims statistics. This research will bring that information to life with independent data, analysis and commentary on the marketplace.

Advisen has worked with AIG to research and produce this report on the US EPLI market for public and private companies. The report compiles a combination of proprietary Advisen data and research, interviews with key market executives and claims case studies. It will define the current state of the market and look at some of the key factors that are shaping the sector in coming years.

Topics covered in the following pages include:

- Market size by premium and capacity placed
- League tables of the leading EPLI carriers in the US
- Buying patterns: limits, rating trends
- Unique segments: what's keeping employers and carriers up at night?
- Carrier's viewpoint: what does an underwriter look for in a good EPLI risk?
- Claims analysis: Sources of federal, state and private employment litigation with case studies

1 Scope it out

Defining exposures and cover

Defining exposures

The legal, regulatory and macro-economic environments play a large role in the prevalence of employment practices claims.

Laws can be set – and enforced – at a federal, state and city level. The range of plaintiffs is very broad, from employees to customers to vendors and other protected classes.

Some of the most influential sources of exposures to corporations come from the following areas of employment law. However, not all of these would be covered by an EPLI policy, including:

- Wrongful termination
- Sexual harassment
- Discrimination
- Invasion of privacy
- False imprisonment
- Breach of contract
- Emotional distress
- Wage & hour law violations

Relevant laws correlated with these exposures include:

- Title VII of the Civil Rights Act of 1964 (prohibits discrimination based on race, color, religion, sex or national origin)
- The Americans with Disabilities Act (prohibits discrimination based on disability and requires reasonable accommodation for such employees)
- Family and Medical Leave Act (provides for up to 12 weeks of unpaid leave per year for care of a serious health condition)
- Age Discrimination in Employment Act (prohibits discrimination against people age 40 and above due to age).

The (EEOC) interprets and enforces these laws. It recognizes eleven types of employment practices discrimination: age, disability, equal pay/compensation, genetic information, national origin, pregnancy, race/color, religion, retaliation, sex and sexual harassment.

Specifically, the EEOC has made the process easier and the downside to bringing litigation much lower than it was years ago, including lower barriers for class action litigation.

Additionally, lawsuits filed have been on the rise as more employees are aware of their rights, and media coverage has publicized many high profile employment disputes.

Paint a picture

Here are a few key EEOC statistics to add some color to this picture:

For Fiscal Year 2013, the EEOC reported: 93,727 charges of discrimination, including:

- o 33,068 race discrimination claims;
- o 27,687 sex-based discrimination claims;
- o 25,537 disability discrimination claims;
- o 21,396 age discrimination claims;
- o 10,642 national origin discrimination claims;
- o 2,721 religious discrimination claims; and
- o 3,146 color discrimination claims.
- 38,539 retaliation claims;
- 1,019 claims for equal pay; and
- 333 genetic information non-discrimination act (GINA) claims

More than most other areas of exposure, employment practices litigation is influenced by the macro-economic environment as well.

The amount of first party EPLI litigation is inversely related to the health of the overall economy for several reasons:

- Economic downturns adversely affect the financial condition of companies, especially smaller entities, which can lead to dismissals and layoffs
- If reductions are anticipated, employees can often look to deter or counter dismissals by filing charges of discrimination or retaliation against their employer
- Mergers and acquisitions often occur when firms are at a competitive disadvantage, and a clash of cultures or duplicate areas of a workforce can lead to similar first party charges
- Other external trends affect this area as well, such as an aging workforce, families with two working parents and/or having children later in one's career

Defining cover

EPLI has become an ubiquitous line of coverage over the last two decades.

Daily news reports are riddled with examples of first- and third-party litigation against companies from a myriad of sources including employees, patrons, vendors and classes of such designations.

Because of the high variability of claims and claimants, and the increasing impact of both regulatory and macro-economic factors, EPLI remains a rapidly evolving line of business for insurance carriers.

What is covered?

EPLI is a type of liability insurance covering wrongful acts arising from the employment process. It is designed to address an entity's exposure to most employment practice-related claims, on a first- and third-party basis.

The most frequent types of claims covered under such policies include: wrongful termination, discrimination, sexual harassment and retaliation.

In addition, the policies typically cover claims from a variety of other types of inappropriate workplace conduct, including (but not limited to) employment-related defamation, invasion of privacy, failure to promote, deprivation of a career opportunity and negligent evaluation.

Some carriers offer a sublimit for immigration claims – fines for failure to check immigration status – and wage and hour claims, for defense costs only.

The policies generally provide coverage to the company and its directors and officers, management personnel and employees against claims alleging employment practices violations brought by employees or applicants for employment. Often times, the policies provide coverage to those same insureds against claims alleging discrimination or harassment brought by customers, vendors and other protected classes of people under the law.

The coverage typically is broad, often times using a 'catch-all' language for discrimination cases that covered claims include "but [are] not limited to" certain areas of law. This provision allows for automatic inclusion of developing legal and regulatory standards. For example, a recent spate of claims focusing on pregnancy would be covered by an EPLI policy, despite not being explicitly mentioned in the wording.

How does an insured stay ahead?

As employment law expands at a rapid pace and differs at federal, state and city levels, it can be difficult for companies to remain abreast of developments.

An interesting additional service that some carriers offer to buyers of EPLI is an allocated session with a reputable law firm to provide training and counseling on legal updates and best practices for employers.

Benefits of this service include making the insured a better risk as training helps to reduce the risk of claims.

What is commonly excluded?

The most common exclusions on EPLI policies are for bodily injury, property damage, contract dispute, intentional/dishonest acts, unpaid wages and rest and meal times.

Punitive damages are generally excluded, but could be covered subject to insurability, where they are included in- and out-of-court settlement, or depending on where the insured is located.

Most EPLI policies are written on a claims-made and reported basis. Insurer payment of defense costs—which are often a substantial part of a claim—typically reduce the policy's limits.

Who should purchase an EPLI policy and how

EPLI is available to corporations as a stand-alone policy, or more frequently, as one component of a combined policy for professional services and corporate liability.

Other coverages in the menu of options for buyers often include:

- Directors' and officers' liability (individual and entity cover)
- Cyber liability
- Professional liability
- Fiduciary liability
- Fidelity/crime
- Kidnap and ransom liability
- Employed lawyers

For the purposes of this report, we will focus exclusively on employment practices liability in the US marketplace and data only includes EPLI purchased as a standalone cover, rather than packaged with other lines of insurance.

Neither the types of claims suffered, nor the scope of insurance cover, differ materially between public, private or not-for-profit entities. Therefore, we do not make the distinction between corporate structures in this report.

2 Market overview

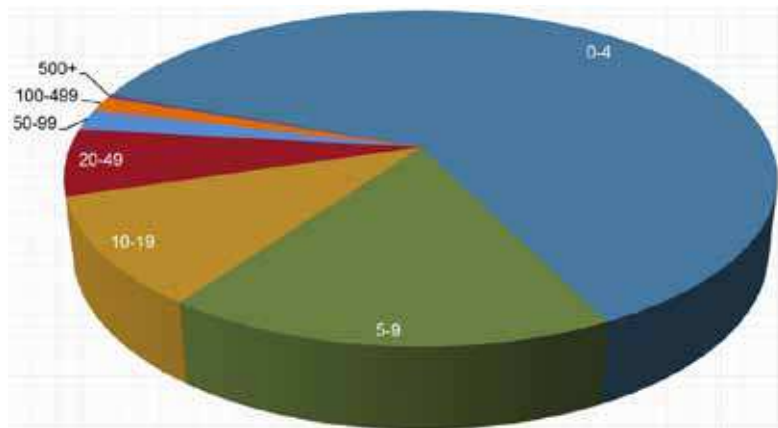
Analyzing the US EPLI market

According to the most recent US Census Bureau statistics from 2011, there were 5,684,424 firms in the US that have employees on a payroll.

Another 21 million firms in the US consist of self-employed persons operating unincorporated businesses.

The data shows that of the 5.7 million employer firms, 62 percent employed fewer than 5 staff (3,532,058), while a mere 98,914 firms (1.7 percent) had more than 100 people on the payroll in the US in 2011.

US firms with payroll, by number of employees



Source: US Census Bureau, 2011

Advisen has been collating insurance-related data on the EPLI sector since its inception in 2000 and has records dating back to 1995.

According to Advisen data and additional market research, overall per-occurrence limits in place in the US EPLI market in 2013 totaled around \$393 billion.

Although a mature insurance market at 25 years old, the sector is showing growth as the US EPLI market's aggregate policy limits are steadily increasing year over year. For example, policy limits increased almost 14 percent in 2013 to \$393 billion from the \$345 billion of limits placed in 2012 which had already shown an increase of 16 percent on 2011 levels of \$338 billion.

Premiums written over the period have increased in line with limits placed, suggesting a static rating environment. However, any estimate of rate levels must consider risk factors and coverage as well.

Indeed, Advisen EPLI premium data shows premium increases of more than 20 percent during the period 2011-2013. We will address pricing trends in more depth in Section 4 of this report.

| Year | Premium Written (\$ billion) | Limit placed (\$ billion) |
|------|------------------------------|---------------------------|
| 2011 | 1.59 | 338.18 |
| 2012 | 1.62 | 344.85 |
| 2013 | 1.85 | 392.62 |

Source: Advisen

The carrier universe

Advisen data captured limit and premiums written by an annual average of 85 US admitted, non-admitted and foreign insurers over the period 2010-2012 and found that almost 85 percent of premium and limits written by those carriers were concentrated in the top 20 carriers. Indeed, around 35 percent of the market premium and limits are written by the top three carriers, AIG, Chubb and alternately The Travelers and Alleghany Corp.

Top of the league

| Advisen Data set Ranking | | |
|--------------------------|--|--|
| | Top 20 EPLI Carriers by Premium | Top 20 EPLI Carriers by Limit |
| 1 | AIG | AIG |
| 2 | The Chubb Corporation | The Chubb Corporation |
| 3 | The Travelers Companies, Inc. | Alleghany Corporation |
| 4 | HCC Insurance Holdings, Inc. | Berkshire Hathaway Inc. |
| 5 | Alleghany Corporation | HCC Insurance Holdings, Inc. |
| 6 | Zurich Insurance Group Ltd. | The Travelers Companies, Inc. |
| 7 | Allied World Assurance Company Holdings Ltd. | Nationwide Mutual Insurance Company |
| 8 | Markel Corporation | American Financial Group, Inc. |
| 9 | Nationwide Mutual Insurance Company | ACE Limited |
| 10 | Torus Insurance Holdings | Markel Corporation |
| 11 | ACE Limited | Zurich Insurance Group Ltd. |
| 12 | Starr International Company, Inc | Allied World Assurance Company Holdings Ltd. |
| 13 | Beazley PLC | AXIS Capital Holdings Limited |
| 14 | Ironshore, Inc. | CNA Financial Corporation |
| 15 | XL Group Plc | Beazley PLC |
| 16 | Berkshire Hathaway Inc. | W.R. Berkley Corporation |
| 17 | AXIS Capital Holdings Limited | Liberty Mutual Holding Company, Inc. |
| 18 | W.R. Berkley Corporation | XL Group Plc |
| 19 | CNA Financial Corporation | Tokio Marine Holdings, Inc. |
| 20 | Endurance Specialty Holdings Ltd. | Torus Insurance Holdings |

Source: Advisen

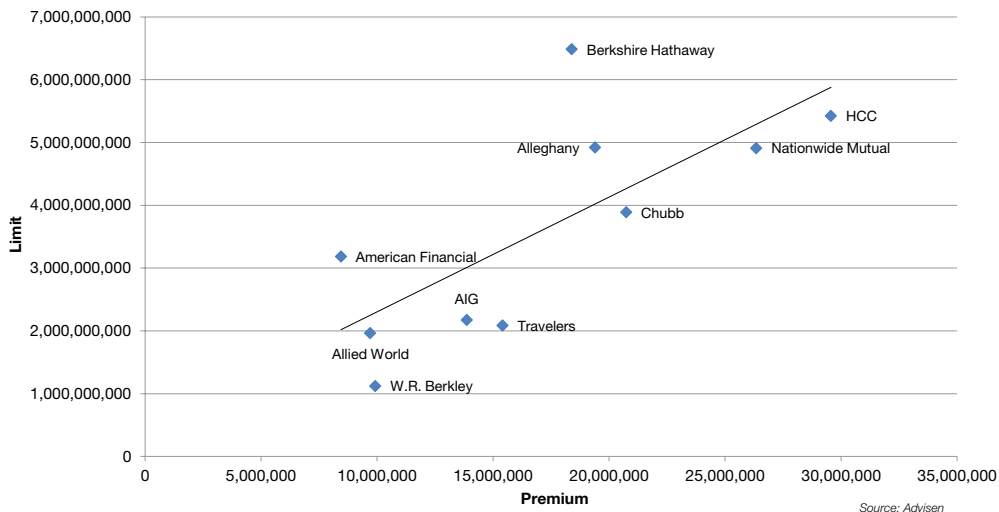
The four scatter graphs shown here provide an indication of the risk appetite for the top 10 EPLI carriers over the period 2011 - 2013.

The graphs, devised using Advisen data, represent US EPLI buyers by number of employees; companies with fewer than 100 employees; between 100-250 employees; companies with 250-1000 employees and finally companies with staff numbers in excess of 1000 employees.

There is a marked split in carrier appetite to write the smaller companies (those with fewer than 100 employees) than the larger firms.

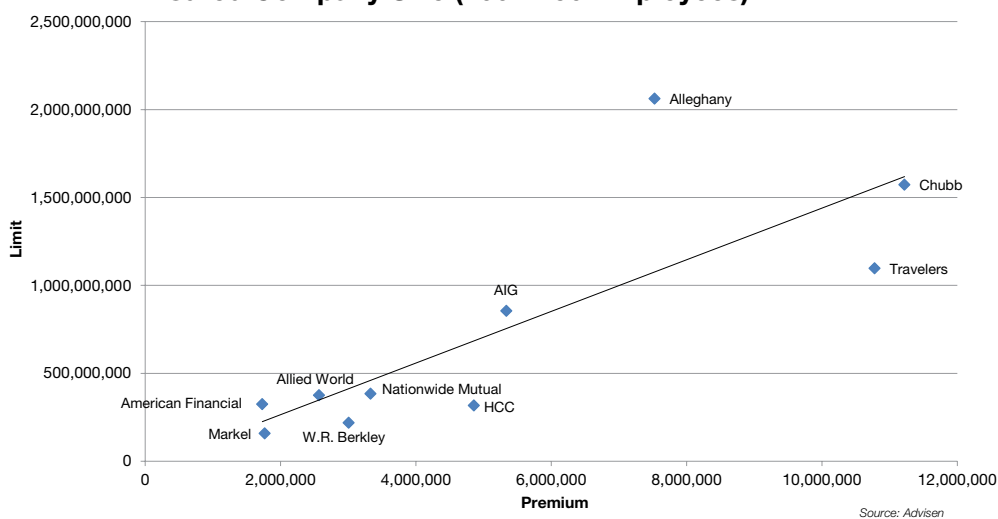
Carrier breakdown by client size

Insured Company Size (<100 Employees)



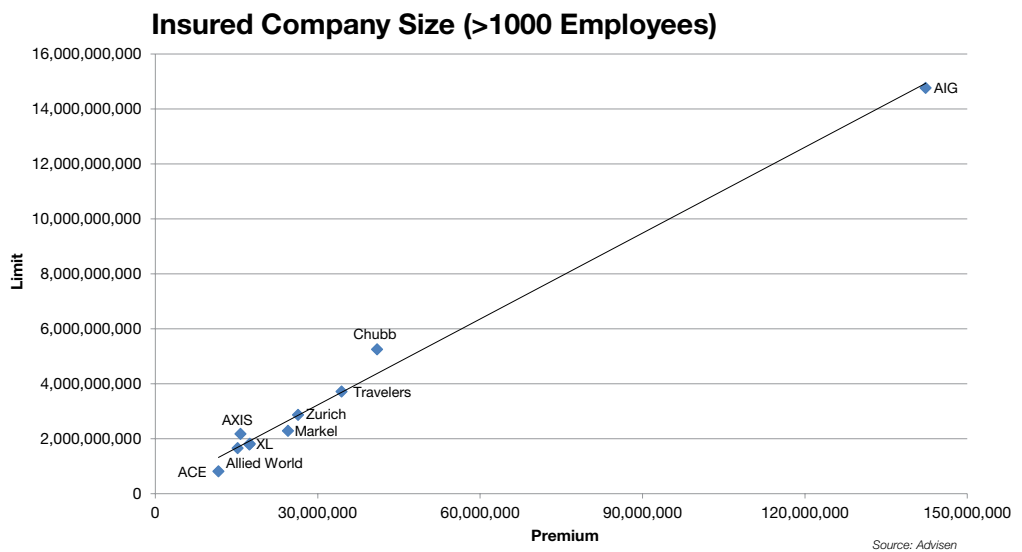
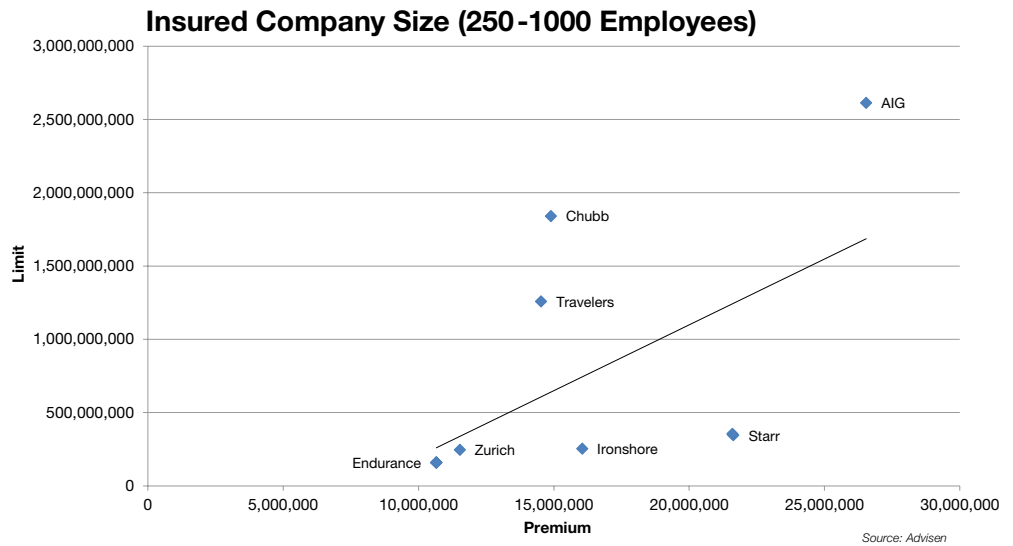
HCC and Nationwide Mutual write the most premium for smaller employers among their top-10 peers, writing total premiums of around \$25-30 million each for this sector. Berkshire Hathaway, meanwhile, leads the group in terms of overall limit written (around \$6.5 billion combined limits), representing premiums of around \$18 million.

Insured Company Size (100 - 250 Employees)



Those carriers below the trend line tend to take more premium for less limit, possibly indicating a propensity to write accounts with higher risk profiles, and therefore attracting more premium. It could also reflect a focus on primary layers versus excess layer placements.

Carriers above the trend line write less premium and more limit than the mean. This could indicate an appetite for excess layers, less risky accounts or a competitive pricing strategy.



The appetite of AIG, the largest writer of US EPLI, becomes clear in these final 2 graphs, representing companies with upwards of 250 employees. In the 250-1000 employee range, AIG writes almost double the overall limits and premiums of its closest competitors, Travelers and Chubb.

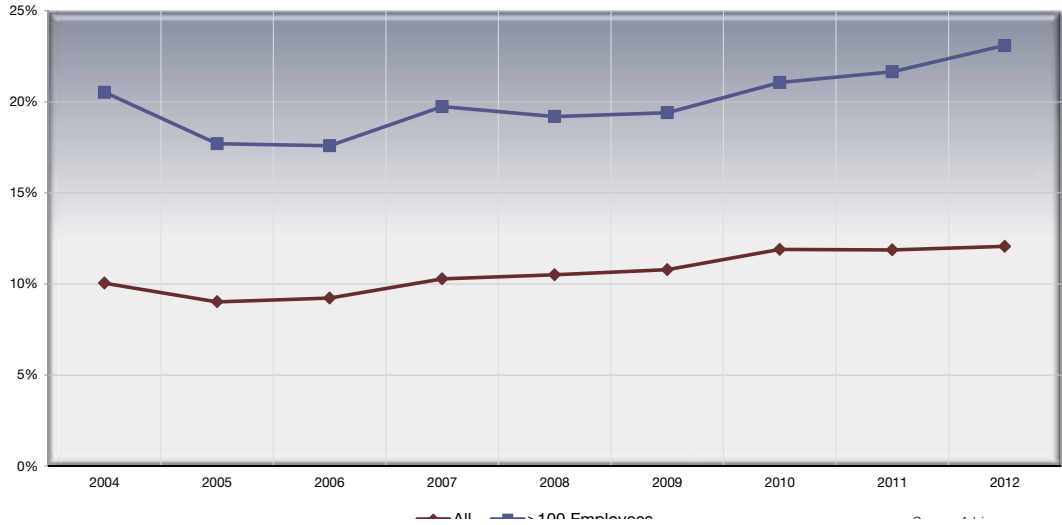
AIG is by far the largest writer of big US corporations.

Room to grow

Despite a mature market that has been offering a range of EPLI products for more than 25 years, there remains enormous room for potential growth in the sector.

Advisen data shows an overall 12 percent market penetration for EPLI purchase in the US, a figure that has remained fairly consistent over the period 2010-2012. Please note that this figure shows only EPLI purchased as a standalone cover and not as a package with D&O or other products.

EPLI Penetration Rates Over Time



However, penetration levels vary widely according to the size of the company. When the same line is plotted only for companies with more than 100 employees, the penetration rate shoots up to between 21 and 23 percent over the same period.

This rate increases to 34 percent for firms with 500-750 employees and further to 40 percent for firms with more than 1000 employees.

Another factor affecting which companies buy EPLI protection, is the industry that company operates in.

Penetration Rate by Industry

| Industry | EPLI Penetration Rate |
|---|-----------------------|
| Agriculture, Forestry and Fishing | 9.09% |
| Mining and Construction | 9.38% |
| Manufacturing | 18.27% |
| Transportation, Communications, Electric, Gas and Sanitary Services | 16.10% |
| Wholesale and Retail Trade | 20.23% |
| Finance, Insurance and Real Estate | 18.29% |
| Services | 12.09% |
| Public Administration | 9.18% |

Source: Advisen

This table suggests that companies in the retail, finance and manufacturing industries perceive most value from EPLI. This correlates with the sources of claims, which we will discuss in more detail in Chapter 6 of this report.

Based on 2013 research by financial newsletter 24/7 Wall St., some of the largest employers in the US are retailers. Walmart topped the list, with 2.2 million employees globally – of which 1.3 million were in the US. Fast food outlet Yum! Foods was the second largest employer with 523,000 US staff and McDonalds was third, with 440,000 US employees.

As noted above, a portion of EPLI limit is combined with D&O and other coverages. This report does not include these combined limits due to the inability to extract reliable data from co-mingled policies.

However, taking D&O penetration rates into account (as this next table shows), the penetration rates increase dramatically.

| Number of Employees | EPLI Penetration Rate | EPLI + D&O Penetration Rate | D&O Penetration Rate |
|---------------------|-----------------------|-----------------------------|----------------------|
| 0-25 | 7.25% | 1.89% | 20.20% |
| 25-50 | 12.01% | 2.56% | 22.89% |
| 50-100 | 14.37% | 4.37% | 29.16% |
| 100-200 | 18.10% | 7.28% | 36.98% |
| 200-500 | 23.19% | 13.16% | 47.35% |
| 500-750 | 33.96% | 22.24% | 49.41% |
| 750-1000 | 28.00% | 18.42% | 51.33% |
| 1000+ | 40.54% | 31.29% | 65.67% |

Source: Advisen

These statistics would suggest that there is enormous growth potential in the EPLI market. However there are particular hurdles to overcome, including price-sensitivity and a perceived lack of litigation risk, especially among the smaller companies with fewer employees.

3 Buying patterns

Pricing and limits – who's buying what?

Having established the overall market size and the main carriers in the US EPLI market, in this section we will scrutinize the patterns of EPLI buyers.

As an introduction, Advisen tapped a select group of risk managers in August 2014 who purchased EPLI policies to solicit their reasons for buying cover and how they would like to see their policies enhanced.

Of the surveyed risk managers, 62 percent declared that they bought the cover as it addressed their company's exposures. Claims assistance of carriers was valued most highly (by 12 percent) while 9 percent valued the additional services offered under the policy and competitive pricing.

The most significant EPLI exposure noted by the respondents was wrongful termination and retaliation claims, closely followed by discrimination (notably age and sex), harassment and wage and hour.

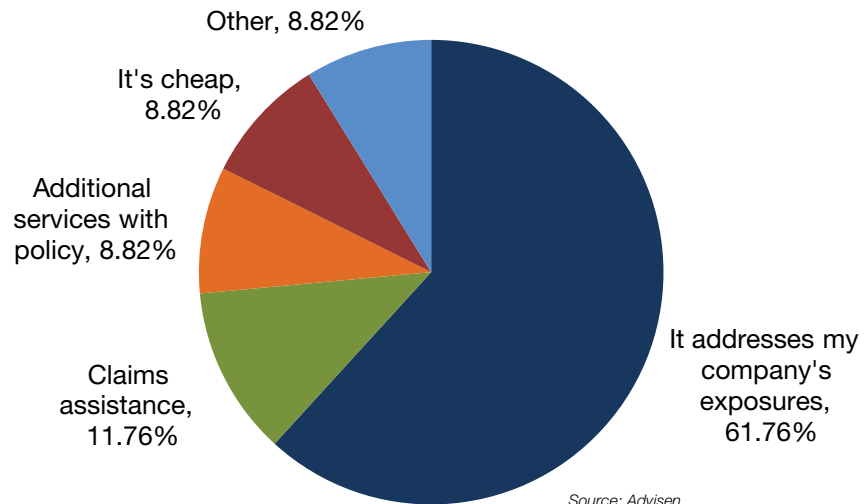
More recent exposures noted by respondents included pregnancy-related and social media exposures.

When asked what cover they would like to see in their EPLI policy, the call for wage and hour to be included was deafening. We will discuss this coverage item in Chapter 6 of this report.

Other enhancements requested by risk managers included:

- Claims advice or a legal advice hotline
- Tools for insureds to self-audit procedures
- Privacy, security, immigration and social media related exposure coverage
- Choice of defense counsel
- The insurer to have more defense control

Why do you buy EPLI?



Why buy?

According to the law firm of Murphy Austin Adams Schoenfeld LLP, "The average cost to have a meritless claim dismissed is \$10,000 to \$15,000. If your company's human resource practices aren't quite up to snuff you might want to try a quick settlement to make it go away. Expect anywhere from \$10,000 to \$50,000 more. What if the other party is determined and perhaps your case is not as strong? Expect \$150,000 to \$200,000 for cost of defense and settlement. One more thing, expect about two years from beginning to end."

Employment jury awards, 2011:

- The median award of employment practice claim \$325,000, up from \$172,500 in 2010
- The amount of claims in the \$250,000 to \$1 million range rose from 34 percent to 56 percent
- The award median for age cases was \$247,800; disability \$292,500; race \$215,652; and sex \$150,000
- Retaliation awards had an award median of \$208,275 with an award mean of \$741,971
- State verdicts averaged more than 1.5 times the average federal court verdict award
- The probability of the plaintiff winning a case at trial stands at 51 percent
- The average employment practices settlement median was \$100,000 with a settlement mean being \$178,063

2012-2013 Edition of Jury Award Trends and Statistics, published by Westlaw

As seen by these first two graphs (below), Advisen data shows the average premium paid and the average limit purchased by US companies is consistently low for all smaller companies, irrespective of industry sector. The data pertains to the past ten years (2003- 2013).

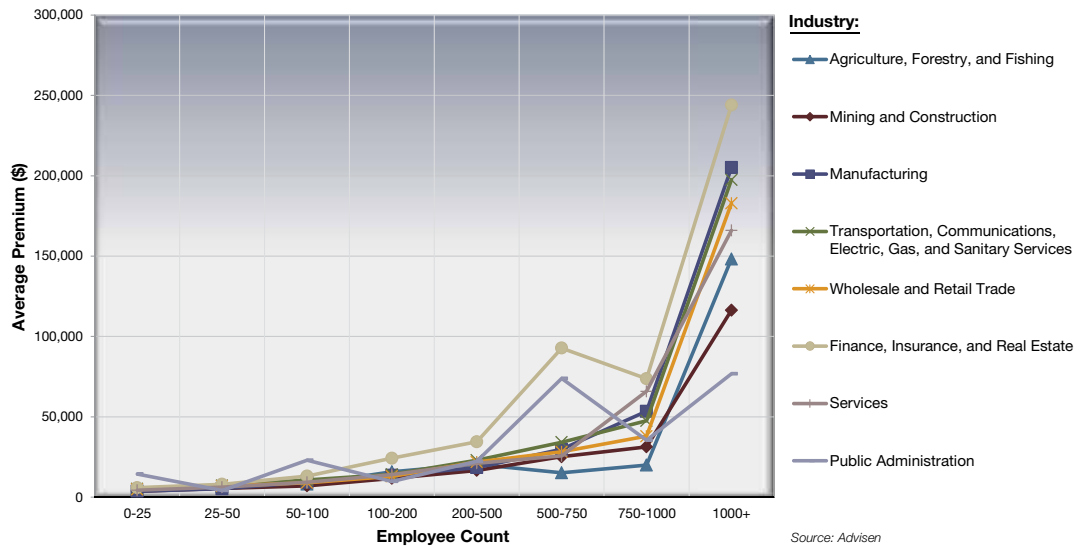
A company with between 25 and 50 employees can expect to pay around \$5,000 for a \$1,000,000 limit, whereas a firm with 100-200 staff will pay an average of \$10,000-25,000 for a limit of around \$1,500,000.

It is in the 500-750 employee range that the various industry sectors diverge in terms of limits purchased and premium paid.

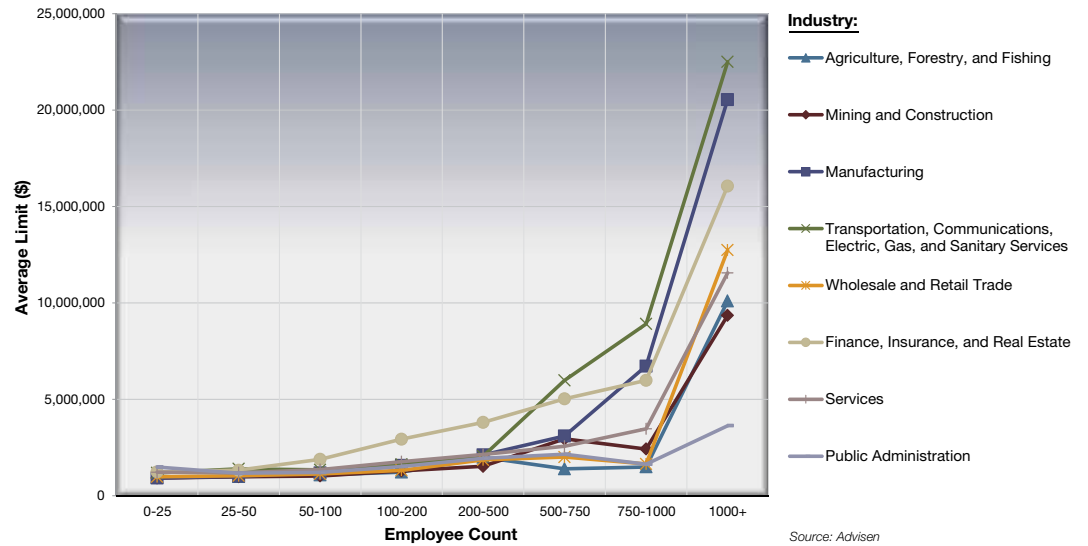
The industries that tend to pay more premium do not necessarily buy the most limits in this category.

Higher premiums are paid by the finance, insurance and real estate sector (average \$92,795) and public administration (\$73,934). There is then a steep drop to the next sector transportation, communications and utilities (\$34,167). The industry that pays the least premium in the 500-750 employee range is agriculture, forestry and fishing (\$15,112).

Average Premium by Industry and Size



Average Limit Purchased by Industry and Size



However, the average premiums paid by some industries have greater buying power. Transportation, communications and utilities buy an average \$6,000,000 limit for its \$34,000 spend while the finance, insurance and real estate sector gets only \$5,000,000 average limit for its \$93,000 spend.

Public administration, which pays the second highest average premium, buys only \$2.2 million of limit on average. This might suggest a risky sector for claims and exposures.

Despite the average limits purchased, there is plenty of available capacity for EPLI cover. Insurance industry executives tell Advisen that primary limits of \$15 million and up to \$25 million with some carriers are available to most insureds.

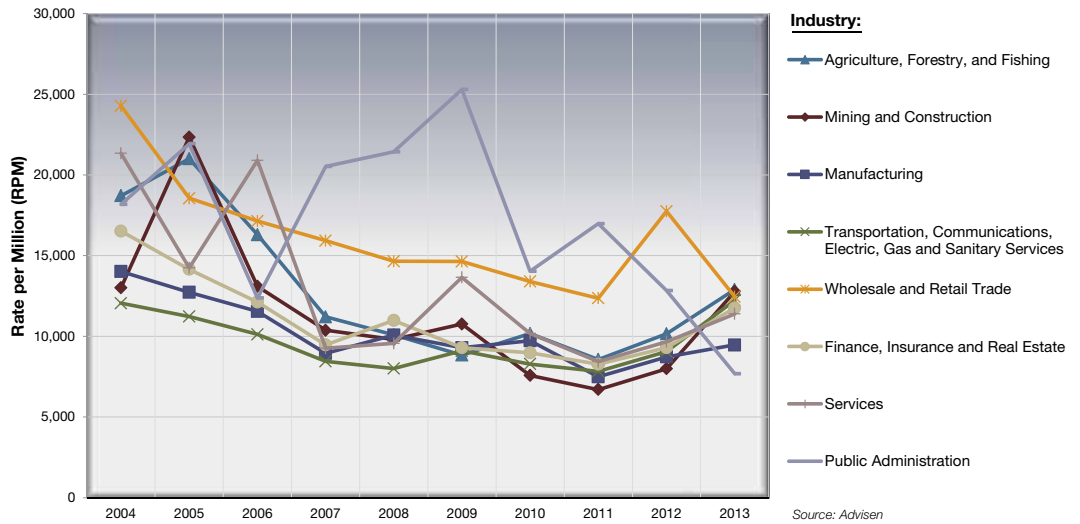
Excess policies – which could take limits up to \$50 million – are also available, but rarely purchased. Underwriters tell Advisen that these excess policies are likely to be purchased by a large company with around 25,000 staff. These will normally be restaurants or name brands with a nationwide presence in numerous outlets.

Phil Rhodes, Senior Vice President in the Private/Non-Profit Management Liability division of Financial Lines at AIG, told Advisen: "In my experience, penetration rates for firms with greater than \$10 million is revenue is relatively high. Many firms

that choose not to buy EPLI believe they can better handle the exposure internally due to their size or other factors, or have had negative claims experience that has led to expensive and/or restricted coverage, and choose to self-insure.”

The most useful metric for analyzing these buying patterns, however, is the average rate per million (RPM) paid by US employers, which provides an indicator for the carrier competitive market cycle and also risk exposure changes in insurance buyers.

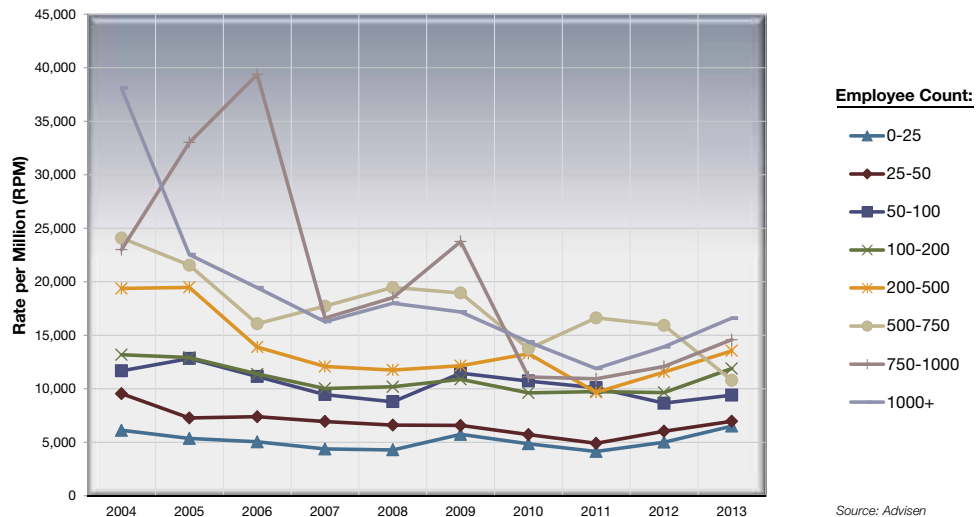
Average RPM by Industry and Year



According to Advisen data, the average RPM has remained relatively static over the period 2004-2013, with a slightly downward trendline for some industries. Notably the wholesale and retail and the public administration sectors have a higher RPM.

Rates fell across the board from 2009 to 2011 and have been increasing steadily since then. For the majority of industries, RPM has increased around 35 percent in the period 2011 – 2013.

Average RPM by Size and Year





Over time, the RPM paid by employers of all sizes has trended downward.

The biggest decline since 2004 has been for accounts with more than 1,000 employees. Average RPM in 2013 was just over \$16,500, versus a rate of \$22,500 per million of cover purchased in 2004.

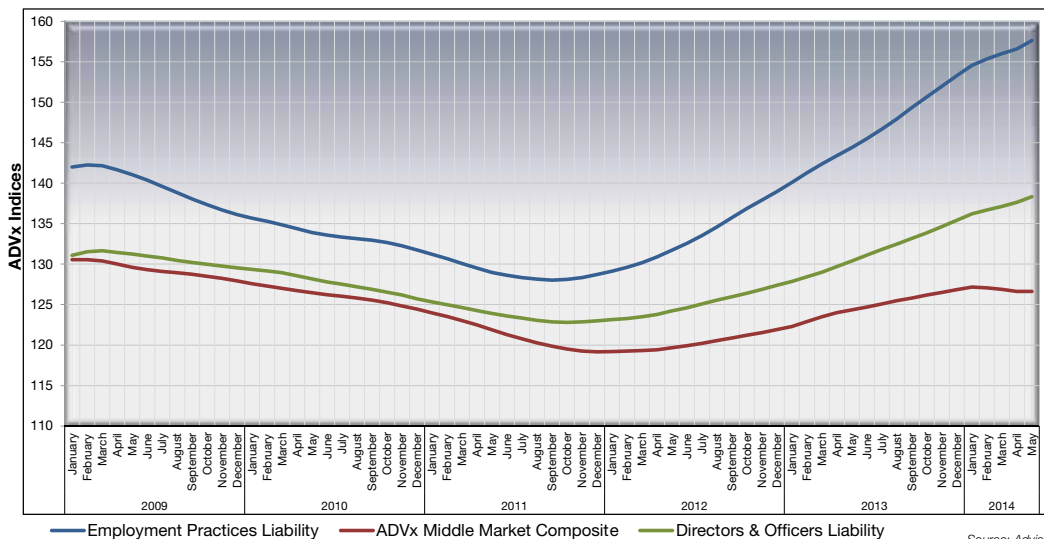
The greatest rating volatility was seen in companies with 750-1,000 employees. Having sharply declined from a peak of \$39,000 RPM in 2004 to just \$11,000 in 2010, this size of company has seen increased rates over the past three years to settle around \$14,500 RPM in 2013.

4 Pricing trends

Into a hard market

EPLI rates are increasing across the board, with Advisen data showing a consistent increase in renewal premiums and RPM on all EPLI accounts since 2011.

Premiums at Renewal Over Time: Index



Source: Advisen

This graphic shows Advisen’s ADVx indices and compares EPLI pricing movements with D&O renewal premiums and also Advisen’s mid-market composite index.

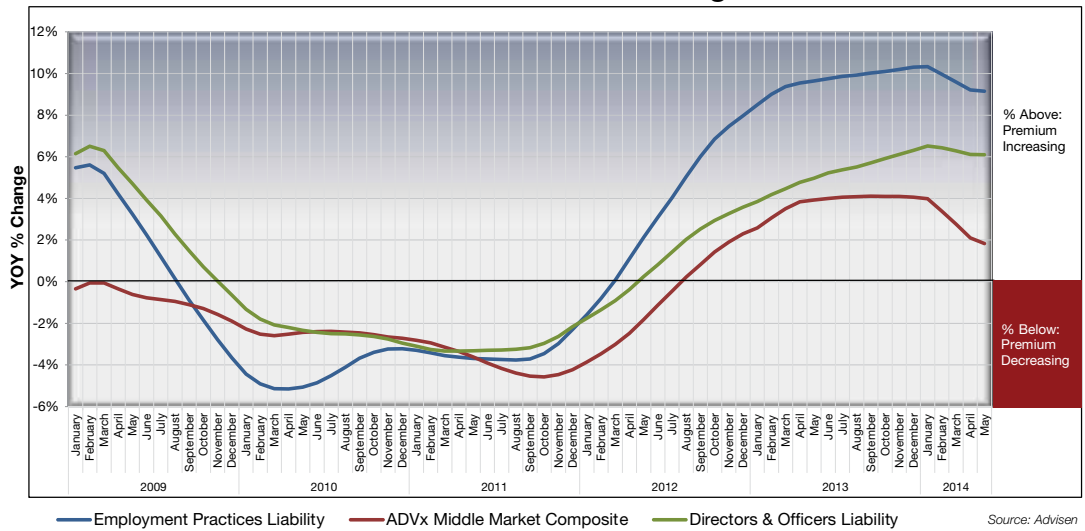
ADVx is a mid-market composite index composed of 19 classes of business – including EPLI – and tracks changes in program premiums paid at renewal by commercial lines insurance buyers. The index is the composite of the individual lines of business weighted by their relative premium volume as reported in Best’s Aggregates and Averages for businesses with annual revenues less than \$250 million. The ADVx includes renewals with existing carriers, as well as business that changes carriers, often at lower rates.

The three indices have largely tracked each other since 2002, with the mid-market composite suffering a steeper fall in renewal premiums from 2008 to 2011.

EPLI premiums have tracked higher than D&O and the mid-market indices since mid-2006 and have remained around 10 index points above D&O premiums since that time.

EPLI and D&O premiums both saw an uptick in 2008, before a three-year soft market saw premiums fall around 15 index points by the end of 2011.

Premiums at Renewal Over Time: YOY % Change



Shown as a percentage change of renewal premium year-over-year, EPLI appears to have suffered a sharper soft market than D&O or the mid-market composite.

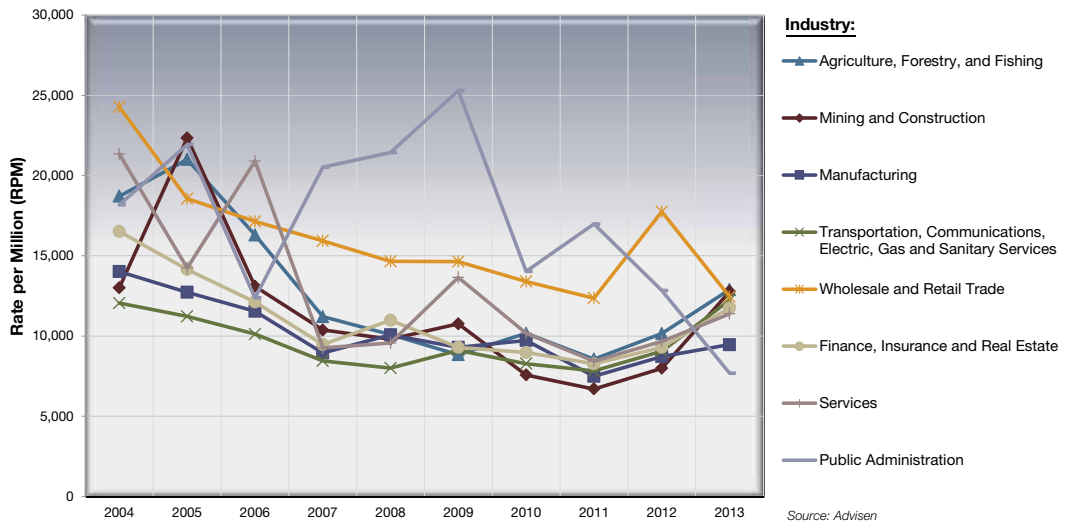
In the above graph, when the line dips below 0%, renewal premiums are decreasing year-on-year and when they track above 0%, renewal premiums are increasing.

With a brief recovery during 2008, the EPLI market had been operating in a decreasing renewal premium environment for more than six years before the market started to recover towards the end of 2011.

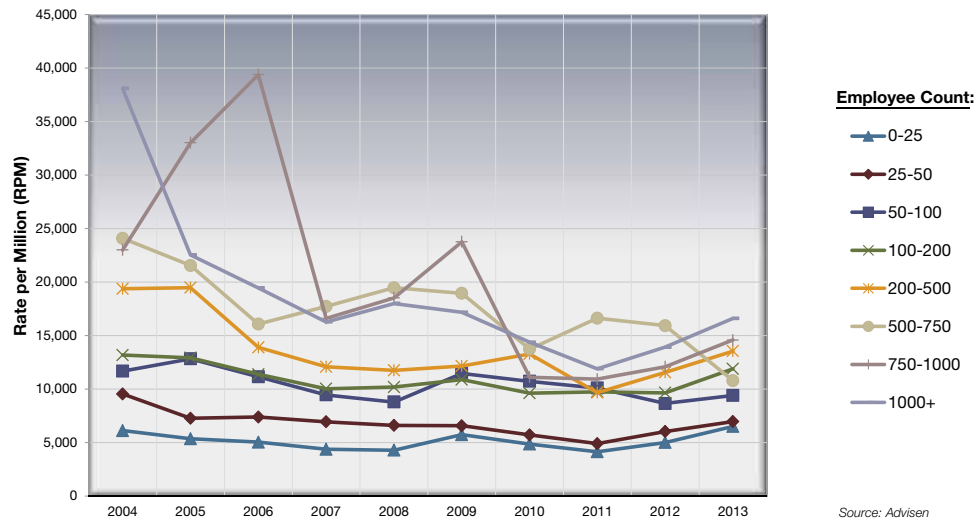
However, while these charts address the EPLI market as a whole, it is important to note that there are various areas of differentiation within the US EPLI sector.

We will touch on some of these in Chapter 7 of this report, but the percentage of increase may vary due to location, industry or carrier. For example, specific industry sectors are seeing higher rate increases, based mainly on claims experience; California has been particularly hard hit with losses and is a state that can find reasonably-priced EPLI hard to obtain; and the higher education sector and healthcare are both high claims industries and are undergoing considerable review by carriers.

Average RPM by Industry and Year



Average RPM by Size and Year



As indicated previously, in the Buying Patterns section of this report, the RPM paid by employers over time has also trended upwards since 2011.

However, when the market is broken down by size of company by employee numbers, companies with 500-750 employees appear to still be seeing RPM reductions. They had, however, been paying consistently more than other companies since 2010 and have only been seeing RPM reductions since 2012.

The smallest companies in the Advisen database with employee numbers below 200 have seen the flattest RPM curve. Recent activity has seen the RPM for companies with less than 25 employees hit a 10-year low of \$4,280 in 2008, before rising to \$6,500 per million in 2013.

The lack of peaks and troughs in this size account may be a strong indicator of the minimum economically-viable rate for writing EPLI insurance.

Companies with 500+ employees demonstrated the most volatility in RPM over time.

Companies with 750-1,000 employees have seen RPM largely in line with other sized companies since 2010. However, before that time, RPM swung between a high of \$40,000 per million of cover in 2006, to just \$11,000 in 2010. This size business has seen a steady increase in RPM since 2010, hitting \$15,000 in 2013.

Comparing different industry sectors, the public administration, wholesale and retail trade and services sectors have consistently paid a higher rate-per-million of cover than other industries. This largely reflects the EPLI risk profile and claims experience of these sectors, which we will cover in more detail in Chapter 6 of this report.

Of course, the above references are general views of the market based on Advisen data. Anecdotally, carriers advised that rate increases of around 10-15 percent were being achieved in the beginning of 2014 on US EPLI accounts, with “considerable re-underwriting” and rate increases of around 50 percent being applied at renewal for certain accounts.

However, this does not include rate changes on business that moves from one carrier to another at renewal, which may be renewing at little or no increase over expiring rates.

With around 85 carriers writing EPLI cover in the US and historically broad wordings, carriers have relatively few avenues for addressing profitability in the EPLI sector. Most renewal battles are fought over rate and retention levels.

Carriers are reporting a hardening of rate and retention across the board in US EPLI. As with most market corrections, pricing had to reach a floor before economic momentum turned the market upward again.

According to Advisen market research, the correction is not solely focusing on claim-afflicted accounts, but market participants point to a “re-underwriting process” occurring across the portfolio.

Underwriters are assessing the package of premiums, self-insured retentions and, to a more limited extent, coverage to reflect the actual risk profile of EPLI accounts, rather than succumbing to competitive pressure as had been the case in the previous six years.

“In the past 10 years, retention levels have remained relatively stable in US EPLI, while defense costs have risen 50-100 percent over the same period. At the same time, competition has driven premiums low. This situation requires a review of the underwriting process,” AIG’s Financial Lines regional underwriting manager for the SouthWest region, Alyssa Dubash, told Advisen.

While it is possible to buy coverage with a \$10,000 retention via some carriers, most are offering minimum \$25,000 retentions on US EPLI, underwriters told Advisen. In California, this minimum is increased and it is not unusual to see minimum \$100,000 retentions on business operating in (or based in) California.

Phil Rhodes noted that the low cost (or no cost) of bringing an employment-related claim in the US was also driving the loss experience in this class. “As a plaintiff, there is almost no barrier to bringing a suit. This has helped drive claims activity. Add to this surplus capacity driving rates downwards and low retentions, and the market became increasingly unprofitable from 2007 forward.”

Market commentator Richard Betterley reported that respondents to a 2013 employment practices insurance market survey “pushed through rate (and deductible) increases that were more aggressive than in most other lines, but that were also indicated by lack of profits.”

Carriers noted increases of between 10 and 20 percent for most accounts, according to Betterley’s survey.

5 The carrier view

What makes a good EPLI risk?

With broad-form insurance coverage, underwriters in the EPLI class of business rely heavily on qualitative analysis of each client's unique risk profile to offer the best terms.

The US EPLI market covers an extremely broad range of companies in terms of size, industry and geographic region. In addition, every company within each sub-section has its own unique exposure profile and risk characteristics.

Advisen asked Phil Rhodes to outline steps organizations can take to enhance their EPLI risk profile.

He highlighted eight key points:

- Develop current and relevant employee guidelines reflecting strong and transparent EPLI policies
- Employ a dedicated human resources department
- Hold regular and certifiable employment and best practices training
- Outline a clear and confidential reporting chain for employee feedback and resolution
- Build controls around information disseminated both electronically and on paper
- Work towards stable employee bases, or measure increases or decreases commensurate with documented business shift, including adverse impact test and releases
- Demonstrate financial stability (a struggling company may see cost reductions including reduction in workforce (RIF)
- Hire outside counsel for employment issues related to RIF's, terminations, etc.

6 Claims trends

The EEOC, dockets and so much more...

There are a myriad ways that employers can fall foul of employment laws and with the number of – and sources of – laws proliferating across the US, it is unsurprising that claims numbers are increasing.

It is important to note that the majority of the data available on employment practices claims pertains to litigation in a court of law. The vast majority of claims are settled out of court. The data provides indications as to trends in employment practice claims, but does not accurately show absolute numbers of claims.

Claims: some sobering numbers

The cost of claims and the duration of employment disputes are also rising. Here are some pertinent figures from Advisen research of EPLI underwriters:

- Defense costs regularly range from \$200,000-300,000
- Plaintiffs costs can amount to \$100,000
- Timeline for resolution of employment litigation: 18-24 months
- Timeline for dispute resolution: 12 months
- Multiple-claimant claims are on the rise: can incur higher insurance deductible

Claims can be brought by federal, state and city regulators as well as the private plaintiff's bar.

In this chapter, we will look at both federal claims (filed as dockets) and large losses from state and the private bar. We will identify trends in types of litigation, affected industries and size of company and also geographical distributions.

Federal claims: not just the EEOC

Federal dockets, which represent cases filed on a federal level, reveal that cases relating to employment practices violations are a consistent presence in terms of cases filed annually.

In 2013, there was a total of 253,914 federal dockets, of which 20,704 were filings relating to employment practices violations, just behind cases pertaining to product liability and law enforcement.

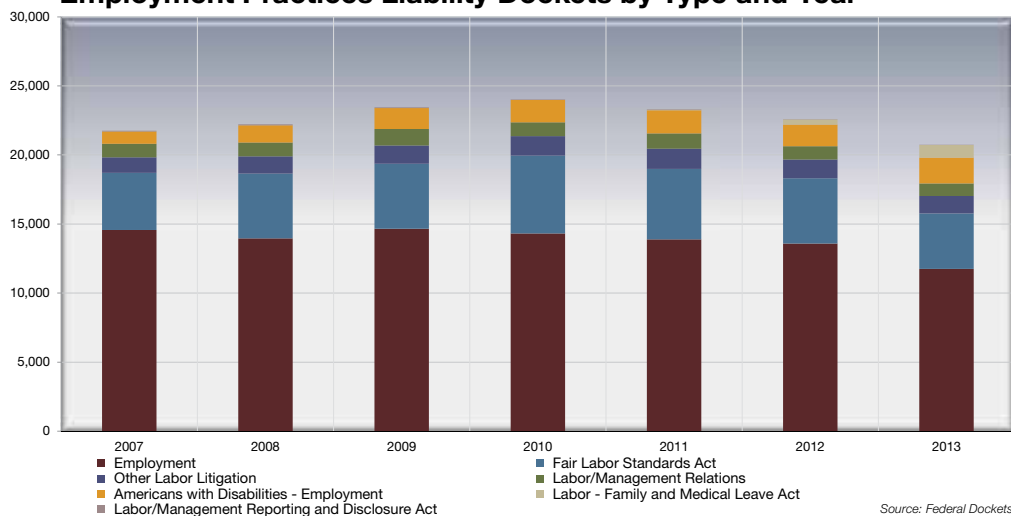
Among the numerous federal agencies, the EEOC is responsible for enforcing laws that prohibit employment discrimination on the basis of race, color, religion, sex, national origin, age, disability or genetic information.

While the EEOC handles employment discrimination cases, the Department of Labor (DOL) administers more than 180 labor laws that enforce wage and hour and occupational safety standards, as well as unemployment benefits and reemployment services, among others. Its Wage and Hour Division is responsible for the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA), two of the most prominent employment acts that have seen significant violations over the years.

Advisen has identified the following docket types that correspond to employment practices liability:

- Employment
- Fair Labor Standards Act (FLSA)
- Americans with Disabilities Act (ADA) which prohibits discrimination based on disability and requires reasonable accommodation for such employees
- FMLA which provides for up to 12 week of unpaid leave per year for care of a serious health condition
- Labor/Management Reporting and Disclosure Act
- Labor/Management Relations
- Other Labor Litigation

Employment Practices Liability Dockets by Type and Year



While the breakdown of these different docket types has remained relatively stable over time, the variation in the relative proportion of each type is where the story is to be found.

Among these docket types, a large number of cases are filed under the general employment category, which captures cases that are not otherwise classified based on the specific type of employment practices violation. These include, but are not limited to, discrimination based on race, gender, color, disability, age, religion, sexual orientation and national origin. Title VII of the Civil Rights Act of 1964 is influential in this type of litigation.

There are also more exact docket case types that are associated with the violations of specific acts, including the FLSA and the ADA. The Age Discrimination in Employment Act (which prohibits discrimination against people age forty and above due to age) is also increasingly influential.

What does the EEOC stand for?


According to the EEOC website:

“The EEOC has the authority to investigate charges of discrimination against employers who are covered by the law. Our role in an investigation is to fairly and accurately assess the allegations in the charge and then make a finding. If we find that discrimination has occurred, we will try to settle the charge. If we aren’t successful, we have the authority to file a lawsuit to protect the rights of individuals and the interests of the public. We do not, however, file lawsuits in all cases where we find discrimination.”

The EEOC itself filed 131 lawsuits and recovered more than \$370 million in 2013, a record high. It also files class action suits on their own accord, as opposed to only focusing on and supporting suits brought on behalf of individuals. These data points are in keeping with the regulatory body’s Strategic Enforcement Plan, which was formed to “focus and coordinate the EEOC’s programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace.”

The six priorities of the Strategic Enforcement Plan are:

1. Eliminating barriers in recruitment and hiring;
2. Protecting immigrant, migrant, and other vulnerable pay workers;
3. Enforcing equal pay laws;
4. Preserving access to the legal system;

- 
5. Preventing harassment through systemic enforcement and targeted outreach; and
 6. Addressing emerging and developing issues.

An ancillary point, but one of note is that the EEOC regularly posts all such data on its website, which may cause unwanted publicity for companies.

EEOC campaigns

The EEOC is a federal agency with 53 regional offices throughout the United States. The regional offices take guidance from Washington, but operate on a regional level.

When the EEOC receives a complaint from an employee, it acts as a gateway for litigation from the local office which has a 'right to sue' in state court. Where there's an accumulation of suits in certain areas, the EEOC may file suit in federal court.

For this reason, claim trends will vary by state, with certain states pursuing particular types of claims at any one time. We will discuss this further later in this section.

The EEOC's mandate only extends to employee discrimination in its many forms, and does not extend to the FLSA, for example.

It is important to note that almost anything that happens to – or does not happen to – an employee can form the basis of a discrimination claim, including failure to hire, promote, or train, harassment and discrimination of all types, termination (constructive or real) and retaliation.

"Every employee in an organization can sue his or her employer for any number of real or imagined threats," AIG's Phil Rhodes told Advisen. "A common misperception is that such coverage is afforded under the general liability policy, which it often is not."

In recent years, the EEOC has lowered the threshold required for employees to bring suits against their employers, leading to a rise in the number of employment practices lawsuits being filed each year.

In 2013 alone, the EEOC handled more than 100,000 employment discrimination cases, as shown in Section 1 of this report. Federal dockets only capture cases that have been filed for litigation, a strategy not always pursued by the EEOC, which explains the divide between the number of employment related federal dockets and the number of cases handled by the EEOC (see box-out).

The EEOC does not limit its scope to any industry sector, employer size or geographical location.

Joseph Gagliardo, managing partner and chair of the litigation department at the Chicago lawfirm of Laner, Muchin, Ltd. highlighted a rise in "statistical cases" where the EEOC does not have to name anyone who has been harmed by a particular policy or practice at an employer. For example, if an employer does not employ a requisite proportion of a certain class of employees in their workforce. "The EEOC then looks for companies in the area with a similar profile and go after them as well," Gagliardo said.

Another example is challenging employers with jobs that are typically gender-bias based on the duties required.

Gagliardo also noted that religious discrimination cases have evolved from cases that involved allowing employees time off for religious reasons, to now focus on dress codes including the wearing of a turban, hijab, trousers, beard or dreadlocks in the workplace.

Here are three case studies from Advisen's large loss database that epitomize other recent claims trends at the EEOC:

Parting is such sweet sorrow...

CVS Drugstore severance agreements

Following a reduction in workforce at nationwide drugstore chain CVS Drugstores, the EEOC brought a lawsuit in February 2014 alleging that the company unlawfully violated employees' right to communicate with the agency and file discrimination charges.

The EEOC alleged that severance agreements, set forth in five pages of small print, were "overly broad" and curtailed the employees from filing a suit or bringing a charge against their former employer.

The EEOC cited Section 707 of Title VII of the Civil Rights Act of 1964, which prohibits employer conduct that constitutes a pattern or practice of resistance to the rights protected by Title VII. Section 707 permits the agency to seek immediate relief without the same pre-suit administrative process that is required under Section 706 of Title VII, and does not require that the agency's suit arise from a discrimination charge.

The EEOC filed suit in U.S. District Court for the Northern District of Illinois in Chicago (EEOC v. CVS Pharmacy, Inc., Civil Action No. 14 C 0863).

The case is significant because if the agreements included a general release not to sue, confidentiality clauses, non-disparagement clauses and a co-operation clause with administrative investigations – could be deemed to be unlawful.

Drinking in the Last Chance Saloon...

Cognis Corp 'last chance' agreements

So-called 'last chance' agreements (LCA) are given to employees who allegedly failed to meet the company's performance expectations. The agreement usually states that, in the event of further misconduct, the employee will be released from their employment.

On May 10, 2007, Steven Whitlow, 19, an employee of Illinois-based Cognis Corp at its facility in Kankakee was presented with an LCA by his employer.

The two-year agreement stipulated that for Whitlow to keep his job, he had to agree that should he "not meet performance expectations," or if he "violate[d] any of the Company's rules or regulations," he would be "immediately terminated without recourse."

In addition, the LCA stipulated that upon Whitlow signing the agreement, he would agree not to pursue any legal claim related to Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Rehabilitation Act of 1973, or the Americans with Disabilities Act of 1990, as well as other acts.

Having second thoughts, Whitlow asked to be released from the agreement and was terminated.

The EEOC sued Cognis, alleging that the agreement Cognis was attempting to force Whitlow as well as five other employees to sign was illegal, and Whitlow's termination constituted retaliation, in violation of Title VII of the Civil Rights Act of 1964.

According to the EEOC, Cognis retaliated against Whitlow due to him revoking the LCA, which it claimed was already an unlawful agreement that attempted to force workers who wanted to keep their jobs to forfeit their civil rights under the terms of their continued employment. The EEOC also contended that many of the provisions that Cognis attempted to make employees agree to were unenforceable.

In December 2011, the court sided with the EEOC and the parties agreed to a settlement of \$500,000 for Whitlow as well as the other employees that were forced to sign the LCA.

Digestive accommodation...

Ford Motor Co telecommuting

Ford Motor Co (Ford) employee Jane Harris' request to work from home up to four days a week as an accommodation for her irritable bowel syndrome was denied by her employers.

In 2011, the EEOC charged that Ford violated the Americans with Disabilities Act (ADA) by denying a former employee the opportunity to telework. It also retaliated by firing her after she filed an EEOC charge, the suit said.

Ford's telecommuting policy authorized employees to work up to four days a week from a telecommuting site. Harris was a resale steel buyer whose job primarily required telephone and computer contact with coworkers and suppliers.

The district court granted summary judgment for Ford Motor, holding that attendance at the job site was an essential function of Harris's job, and that Harris's disability-related absences meant that she was not a "qualified" individual under the ADA. The lower court also ruled that Harris's telework request was not a reasonable accommodation for her job. The district court also said the EEOC could not prove Harris's termination was retaliatory because it was based on attendance and performance issues that pre-dated her charge filing.

The Sixth Circuit panel majority reversed the lower court on both counts. (EEOC v. Ford Motor Co. (6th Cir. No. 12-2484)). The majority noted that "the law must respond to the advance of technology in the employment context and recognize that the 'workplace' is anywhere that an employee can perform her job duties."

EEOC General Counsel David Lopez hailed the decision as the "latest in a series of cases ensuring persons with disabilities are allowed the opportunity to use their talents fully. The decision reaffirms the employer's important obligation to provide a reasonable accommodation unless it can show it results in undue hardship."

The ADA offers protection against discrimination based on disability by mandating that persons with disabilities be ensured equal opportunities in employment. The ADA Amendments Act of 2008 (ADAAA), introduced broader protections for disabled workers. ADA violations often occur when employers deny employment opportunities to otherwise qualified individuals on the basis of their disability, or when reasonable accommodations are not met in the workplace. While not the largest type of violations in terms of magnitude, ADA violations represent a growing proportion of employment practices dockets, one that is expected to grow given the expansion of protections with the passing of the ADAAA.

Emerging discrimination issues

While not constituting a significant proportion as yet, violations of the FMLA have been particularly visible in the past couple of years. The FMLA requires employers of 50 or more employees to provide employees with up to 12 weeks of unpaid, job-protected leave to attend to serious personal or family health issues, the birth or adoption of a child, or other qualifying

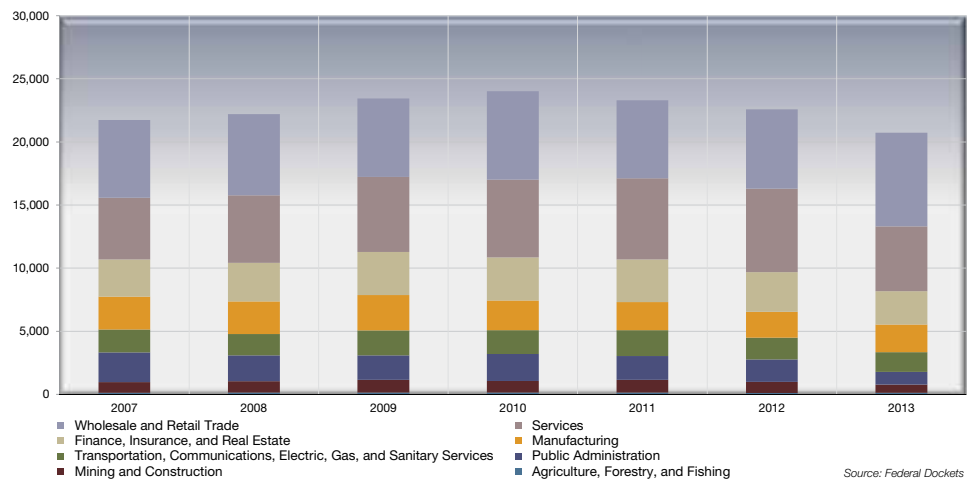
exigencies without any interruption in their group health insurance coverage. Violations of the FMLA often involve employers that refuse to allow FMLA leave or employers that fail to restore employees to their former positions after their time off.

Advisen data shows an interesting development for 2012-13: the emergence of ‘Labor – Family and Medical Leave Act’ as a new category.

With regard to age-related activity, while the number of age discrimination claims continue to increase, so do the liability and damages issues associated with defending and resolving these claims.

“As our population continues to age and remain healthy, it can no longer be assumed that people will retire at age 65. Therefore, economic damages (back and front pay) can be considerably higher based on the longer work life of employees. As in any reduction in force, particularly in age discrimination claims, statistical analysis supporting the basis and methodology of the termination decision(s) is important. While statistical analysis may be costly, it can support a successful motion for summary judgment,” ALG’s Phil Rhodes notes.

Employment Practices Liability Dockets by Industry and Year



The industry with the largest number of employment practices violations is the wholesale and retail trade, which made up almost 40 percent of employment practices cases filed in 2013.

According to a January 2012 article in the Harvard Business Review by Professor Zeynep Ton from MIT’s Sloan School of Management, the business model is to blame. Many retailers compete on low prices and view labor as its largest controllable, and hence most convenient, source of cost that can be minimized.

For this reason, there tends to be an under-investment in both the quantity and quality of labor within the industry. As a consequence, employees work long hours to make up for understaffing while being offered low wages, insufficient benefits and inadequate training.

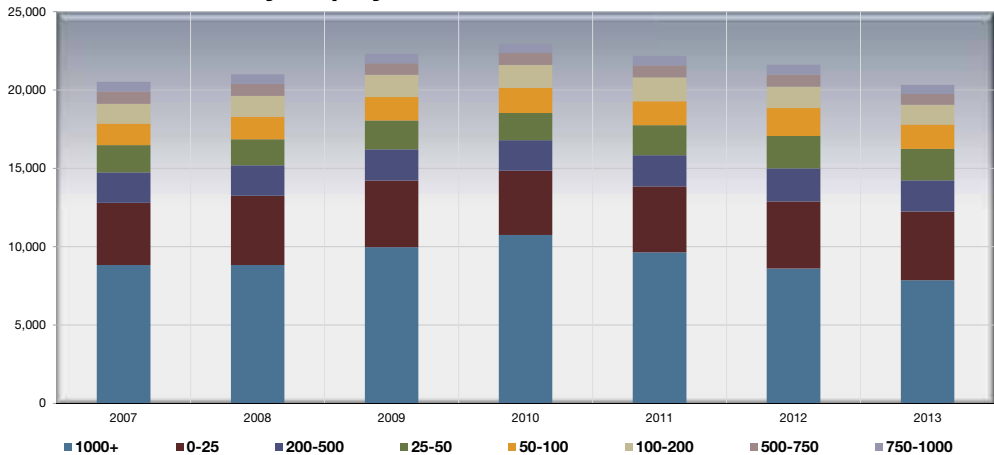
In certain cases, managers have been known to force employees to work off-the-clock, where employees are not compensated for all the hours that they have put in.

In this regard, Wal-Mart is consistently at the top of the list in terms of the number of violations. One such class action suit claimed that Wal-Mart failed to pay its employees for missed rest breaks as well as off-the-clock work in over 130 Walmart stores in Pennsylvania, leading to a penalty of approximately \$187.6 million.

Rhodes adds from AIG's experience that the top five industries where a significant percentage of claims are made are: retail and service industry; healthcare; manufacturing and education.

"The majority of third-party claims we see are brought by customers and of course students, which we will explore in greater detail in Chapter 7. Many of the customer claims involve restaurants or other public facilities where the customer alleges disability discrimination when s/he is denied access to an insured facility. Some of these have developed into record class actions, with multi million dollar settlements," Rhodes added.

Docket Count by Employment Size and Year



Source: Federal Dockets

Unsurprisingly, large companies with more than 1,000 employees face the largest number of employment practices complaints.

The second largest source of complaints, however, comes from companies on the other end of the spectrum. Companies with 25 or fewer employees face a growing proportion of the number of cases filed, and are typically at a higher risk given that a much smaller percentage of these companies purchase EPLI compared to larger companies. While companies with less than 25 employees make up more than 90 percent of the companies in the US, only about 7 percent of them purchase EPLI coverage, a glaring discrepancy.

One reason why small companies tend to discount the need for EPLI is due to the belief that there is little basis for employment related claims against them due to their size. For example, many federal and state statutes tend to exclude small companies from liability, such as the FMLA, which only applies to employers with more than 50 employees.

Yet, for every one of these statutes, there exists many more that could impose liability on these companies. To navigate this complex legal landscape, small companies would serve themselves well to have a dedicated human resources department (which, more often than not, they lack due to their small size) that keeps track of these ongoing developments.

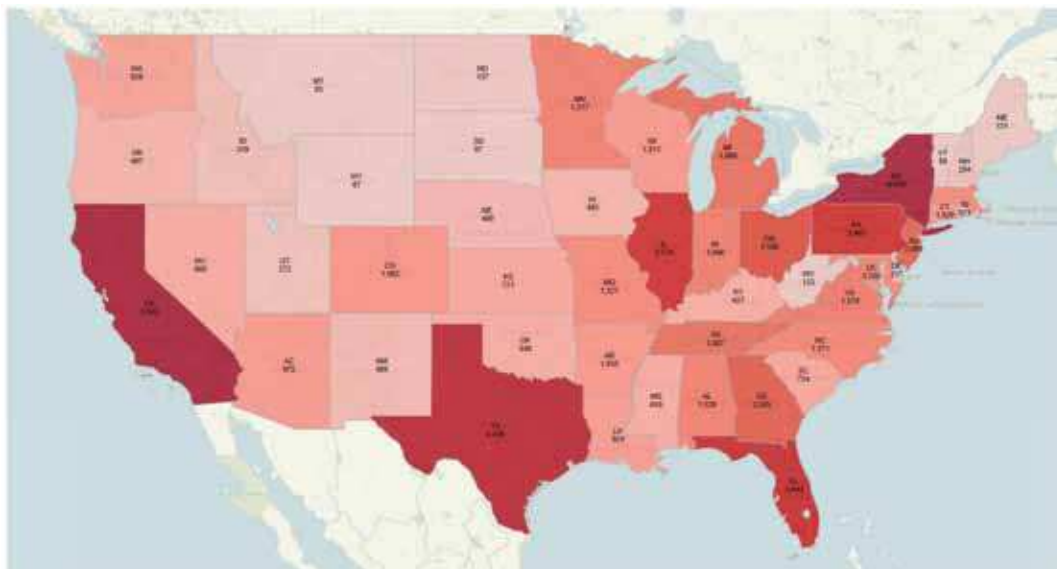
In addition, small companies tend to have poor employment practices as they often lack a human resources department altogether. This further exacerbates their employment practices liability risk, since supervisors at these companies tend to have little or no guidance in how to hire and manage their employees, exposing the company to more liability due to poor or illegal employment practices.

Furthermore, not having a formal human resources department means that there is often no infrastructure for recourse in place for employees to bring forth complaints that could have been settled within the company before it escalates into a full blown lawsuit.

For these reasons, small companies are particularly vulnerable to employment-based claims.

From a location standpoint, the states with the largest number of employment-related federal dockets are New York, California, Texas and Florida. It should be stressed that employees also have recourse on the state level, with California having the distinction of leading the pack.

Dockets by State



Source: Advisen

FLSA

Our reader will note that in the ‘Employment practices liability dockets by type and year’ graph above, the FLSA features as a significant portion of federal dockets over time.

The FLSA establishes wage and hour standards, as well as limits on the employment of minors. As such, the majority of FLSA dockets tend to involve the violation of minimum wage and overtime pay standards and child labor protections. FLSA violations make up the second largest category of employment violations, followed by ADA violations.

However, these cases do not feature as heavily on insurer’s claims experience, as FLSA (or Wage and Hour) claims are generally not covered under EPLI policies.

According to sources, only around 10 percent of EPLI policies offer cover for Wage and Hour claims – and typically subject to a small sublimit of around \$250,000 for defense costs only. Carriers also tend to cover single-claimant cases only.

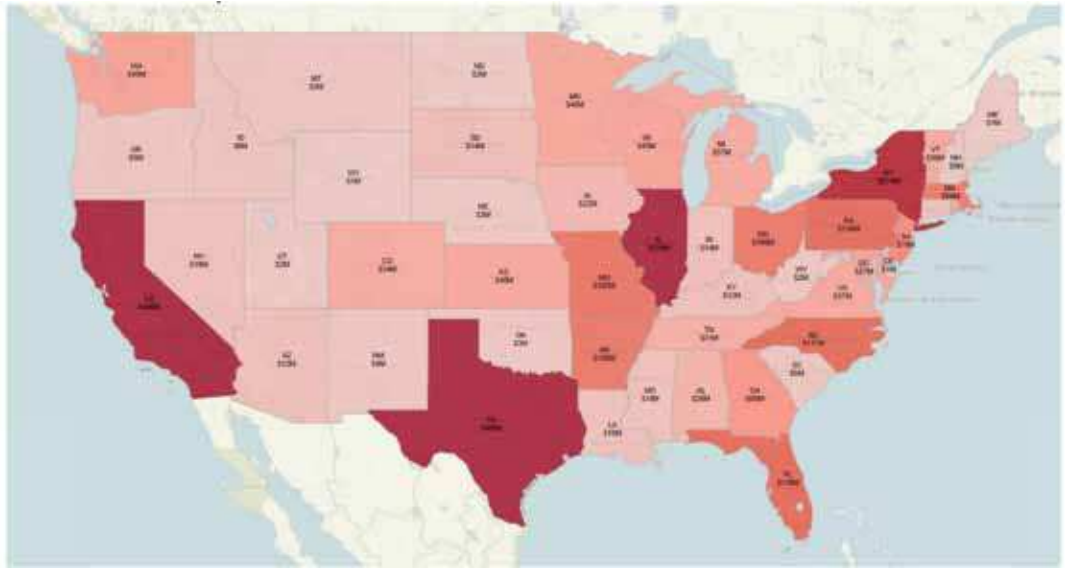
Carriers are largely withdrawing from offering these sublimits of cover, as defense costs would often result in a total loss to the policy and rendered the cover unprofitable.

State and private bar

As stated above, the EEOC isn’t the only body that can bring a suit. However, it is a very influential trend-setter for wider litigation. “Where the EEOC goes, the private plaintiff’s bar tends to follow suit,” Gagliardo said.

As with the federal dockets claims heatmap above, the geographical distribution of claims for large employment-related cases bears close resemblance.

State claims heatmap



Source: Advisen

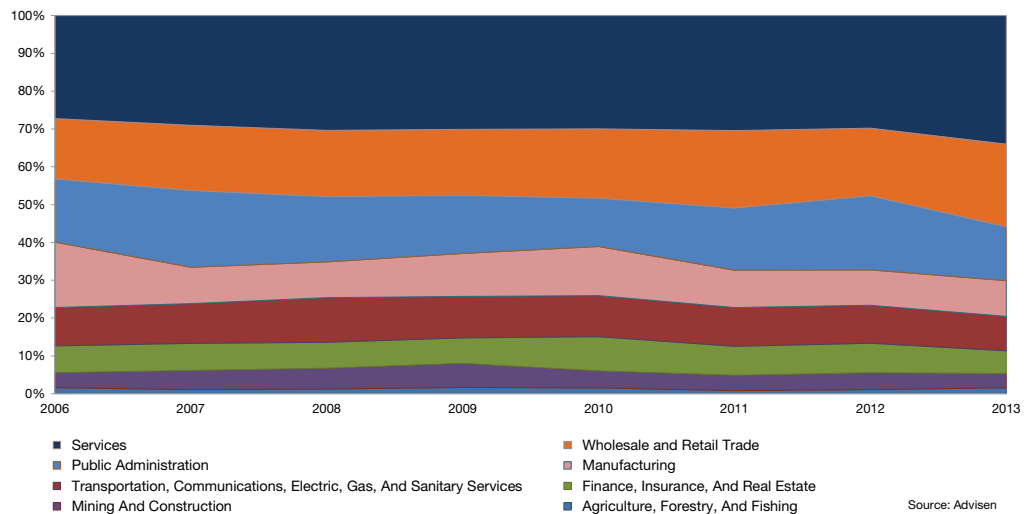
According to Dean Constantine, Global Head of Employment Practice claims for Financial Lines at AIG, “Jurisdictions such as New York and California tend to have greater levels of employee protection than at the federal level.” For example, federal laws may put caps on punitive damages awards, whereas state legislation may not.

There are also state administrative agencies, particularly strong in California (Fair Employment and Housing Commission), New York, Florida and Massachusetts.

Considering large losses outside of just federal dockets, it becomes clear that wage and hour, wrongful termination and discrimination are the dominant causes of claims.

By industry, the picture is largely similar to the dockets: dominant industries include services, the wholesale/retail trade and public administration.

Industry Composition Over Time: Employment



Source: Advisen

Constantine explains that higher education claims (which fall within services in the graph above) typically revolve around ADA reasonable accommodation claims and denial of tenure, failure to renew contract claims.

The healthcare industry (also under services), employs lower paid administrative employees that may allege denied promotion, harassment, retaliatory discharge or whistle blowing. At the other end, you have higher compensated employees – such as doctors, nurses etc – who can demand large payouts for successful claims.

More on these unique sectors in our next chapter.

7 Unique segments

Emerging issues and die-hard challenges

As discussed in previous chapters of this report, there are a myriad of ways that employers can fall foul of employment laws. However, on inspection, there are certain jurisdictions, industries or type of claims that are having the most impact on the EPLI market in the US.

In this section, we highlight two unique segments in the market: California-domiciled risks and the higher education sector. We will also look ahead to three areas of emerging risk.

California dreaming...

“California is the precedent-setter when it comes to employment practices litigation,” notes Dubash. “It is a watershed state that will always be the first mover in employment practices issues that then spread across the country.”

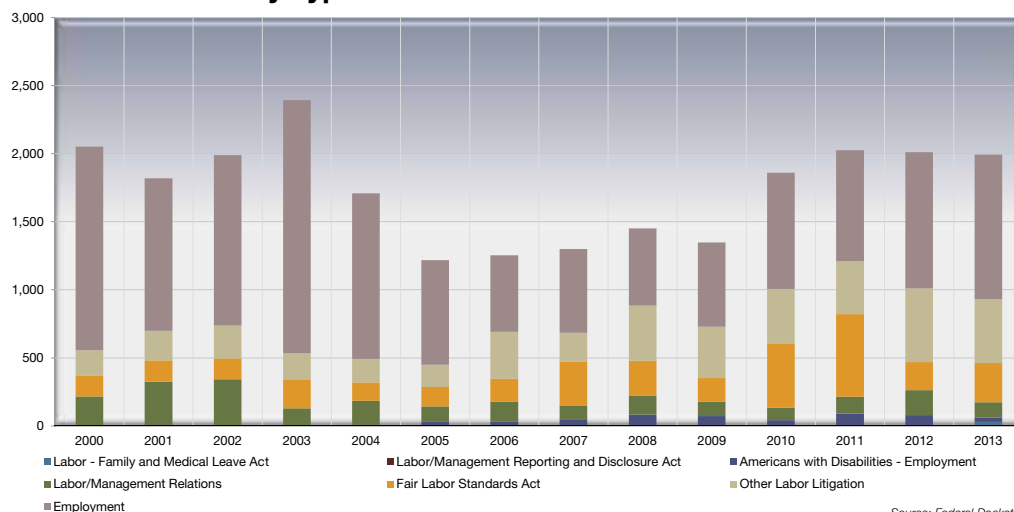
California EPLI exposures have developed into a unique risk profile. The threshold for bringing EPLI claims in the state of California is very low, and the impact of these claims – defense, settlement and/or indemnity – is very high.

From an underwriting perspective, the increase in claims arising out of California has driven a dramatic shift in underwriting practices in the state. Underwriters report that self-insured retentions are regularly \$100,000 at a minimum for a California-based employer. Self-insured retentions can be as low as \$10,000 outside the state.

Some carriers have non-renewed their Southern California books of business as competition has driven rates and retentions below profitable levels in recent years.

Therefore the state is undergoing a hardening market across most carriers in terms of premiums and retentions.

Docket Count by Type: California



As stated in Section 6, the majority of employment practices claims are settled rather than finding resolution in court. Therefore, the marked increase in the number of dockets filed in California since 2010 is all the more impactful, as it represents only a fraction of the employment practices activity in the state.

The number of employment-related suits has increased as a percentage of the whole, with other labor litigation taking second place. The next largest group of dockets filed in California result from the FLSA, particularly Wage and Hour cases.

The number of cases peaked in 2011 but is still high, despite having fallen in the past two years.

State laws in California are generally more employer-friendly than federal laws. For example, the ADA requires that a plaintiff have a true disability, while the California Family Rights Act (CFRA) is more lenient. The CFRA has a broader definition of a disability often times making it more turnkey for the plaintiff to meet the first burden of proof to prove their case.

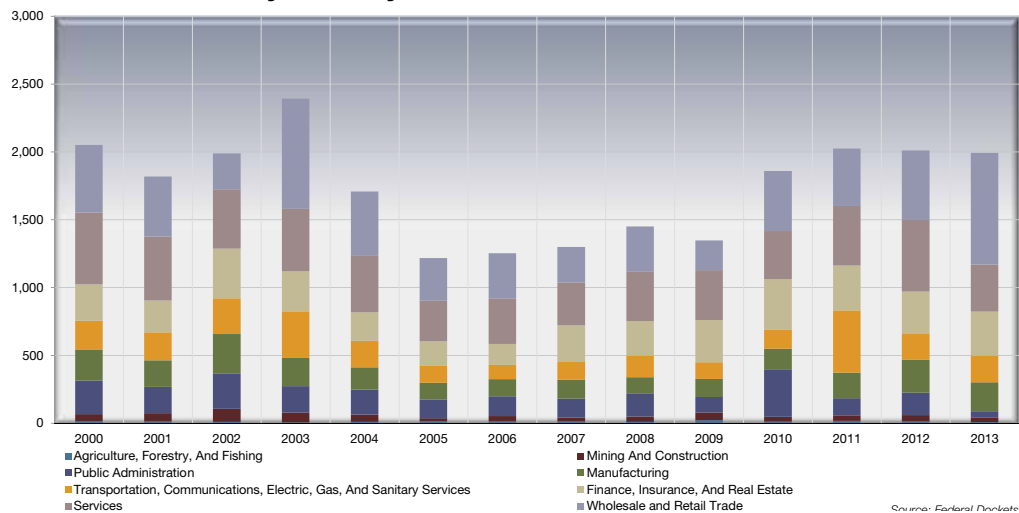
Due to the increased claim activity, the rates for those attorneys who handle these types of cases in the state are very high. As a result of increased activity and attorney fees, budgets can be many times over what we can expect in a more employer friendly jurisdiction.

Many populous counties in California are considered employer friendly, including Los Angeles County and Oakland in Alameda County. Plaintiff's counsel often times uses this as leverage to drive up settlement values.

In addition, the court systems are constantly booked, with some cases possibly dragging on for several years and driving up costs and settlements. When a trial is scheduled, all parties are required to prepare for the trial which is extremely expensive and causes litigation budgets to increase significantly. These expenses are exacerbated if the court then needs to delay the trial, usually doubling the cost of the preparation.

There are still a large number of wage and hour cases being brought as class actions.

Docket Count by Industry: California



Many times, the lead plaintiff will bring in an individual action for retaliation, wrongful termination or discrimination. Even if wage and hour claims are not covered by the policy, the fees are typically driven up in the individual portion.

A concerning development for carriers in the state is one of "fee shifting". This is where plaintiffs are awarded all fees in a successful case, even if the plaintiff wins just \$1 of damages. This, again, is used by plaintiff's counsel as leverage to drive up settlement values.

Many companies in California have instituted arbitration provisions as a way to cut costs. However, it is rare that an arbitrator will grant a motion for summary judgment and all of the while, the arbitrators can be charging between \$400-\$600 per hour. The burden of the arbitration costs usually rests on the employer per the arbitration agreement.

Assessing dockets filed in California by industry segment, the worst-hit industries include the wholesale and retail trade and services (which includes healthcare and higher education).

Campus blues...

One unique risk sector in the services industry is education, which presents a very different risk profile to EPLI coverage.

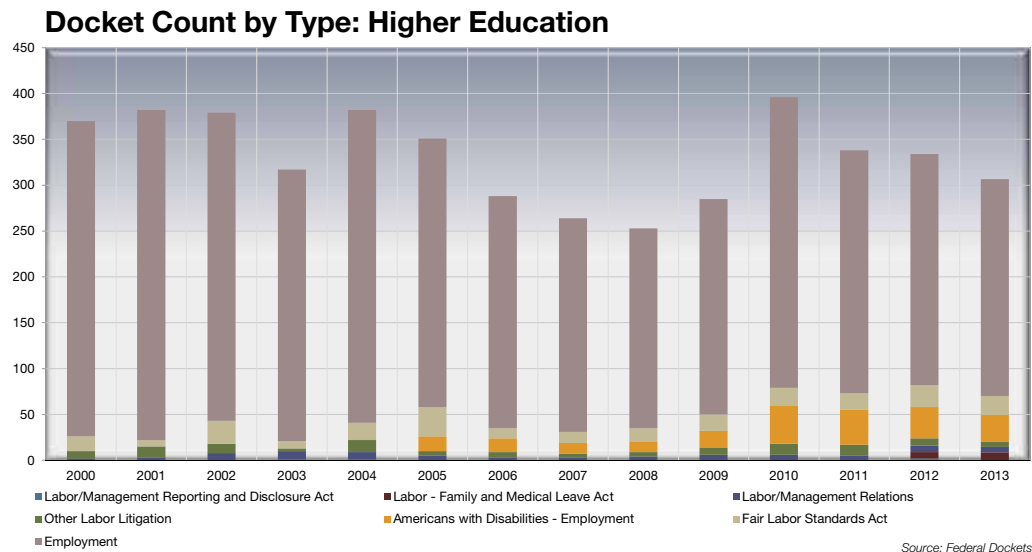
It is interesting to note that a large portion of dockets address disabilities litigation – in particular the ADA.

As stated previously, education claims revolve around ADA reasonable accommodation claims and denial of tenure, or failure to renew contract claims.

Five key risk EPLI factors for the education industry to consider include:

- The industry is highly regulated. Local, state and federal regulatory bodies have vested interests in the performance and practices of colleges and universities within their jurisdictions.
- Wide employee base. Universities' employee bases range from low level employees to highly compensated faculty and administrators.
- Colleges and universities, by their nature, are fertile grounds for critical thinking which is not only accepted, but encouraged.
- In many instances, colleges are one of the largest, if not the largest, employers in its geographic area. Their development and success can affect a substantial percentage of the local population.
- Likewise, they can also play a large part in their community from a public and social perspective. The tone of a college often infiltrates the community, and the term 'college town' can mean different things in different areas.

While tenure related claims top the list of impactful litigation, there are several other areas of note.



Increased governmental and regulatory scrutiny has led to more litigation brought under the false claims act, as well as criminal investigations of university officials.

Student claims, as referenced above, typically come in the form of discrimination or harassment, against a university employee directly, the entity or students. They can also include allegations of discriminatory programs, practices and procedures.

Other growing areas of impact are misrepresentation, failure to educate, and use of funds. While they tend to take the form of D&O litigation, they are worth mentioning as they have been on the rise.

Vicarious liability, typically allegations of negligent hiring or supervision and allegations of mishandled issues such as sexual assaults or bullying, are also emerging to the forefront.

If the donor feels that the university did not use their donation for the purpose specified, they can sue for return of funds.

An emerging issue we see is the expanded definition of what constitutes an 'employee.' A small handful of schools have begun designating compensated athletes in their student body as employees, which of course can substantially widen the exposure of both carrier and insured.

Into the future...

Three trends are expected to become more influential in the coming years:

Criminal Background Checks

The EEOC had targeted companies for the alleged discriminatory impact of criminal records screening policy for applicants for employment. While the EEOC had gained some traction for this position, a court has recently granted class certification in a New York action (not brought by the EEOC) alleging disparate impact discrimination based on criminal record screening practices. (*Houser et al v. Census Bureau*)

The suit seeks back pay and equitable relief for a class of unsuccessful Latino and African-American job applicants. The Bureau allegedly discriminated against them by rejecting applicants on the basis of an arbitrary and inflexible assessment of their prior criminal records.

The class certification will in all likelihood encourage similar claims by the plaintiffs' bar and the EEOC.

Social Media

We expect to see claims arising from the prevalence of social media and employers attempting to regulate employee's work-related social media posting.

Most of the decisions to date have been by the National Labor Relations Board (NLRB) in cases challenging employers' social media and related communications policies.

The cases highlight the need for employers to determine whether employees reasonably would read the policy to prohibit discussion about the terms and conditions of employment (including wages).

Employers cannot ban all negative comments about their organization or establish subjective standards to determine what are negative comments (what social media content the employer would consider "inappropriate"; "unprofessional" or "unfavorable").

Continued high volume of disability claims

These include, in particular, student and customer claims in the realm of on-line technology and full access to services.

We have seen a class action on behalf of deaf or hard of hearing people alleging they were denied access to digital streaming services since all DVDs/Blu Rays do not have closed captioning, etc.