## CONDUCTING INTERNAL INVESTIGATIONS

**DECEMBER 11, 2023** 

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## **TOPICS**

- Coverage & claims
- Conducting workplace investigations
- Member codes of conduct and investigations
- Implementing best practices
- Q & A



## WHY ARE WE HERE?



#2 in claims filed for 2023



EPL claims decreased 21% over 2022



## **CLAIMS HISTORY - 2023**

- 4 Wrongful Termination
- 3 Discrimination
- 1 Retaliation
- 1 Hiring Decision



## NAR Institutes, Societies & Councils

- State and Local Chapters
- Subsidiaries

### State and Local REALTOR® Associations

- Charitable Foundations
- Political Committees
- Educational Endeavors

MLSs wholly-owned by two or more Associations





**Directors & Officers** 

**Committee Members** 

**Employees** 

While acting within the scope of their duties on behalf of the insured entity.





#### - SPOILER ALERT -

# INTERNAL INVESTIGATIONS ARE NOT COVERED BY THE NAR POLICY



## **Employment Practices Liability (EPL):**

- Employment-related discrimination;
- Employment-related harassment, including gender, racial, religious, sexual orientation, pregnancy, disability, age, or national origin-based
- Harassment, or unlawful workplace harassment, including workplace harassment by any nonemployee;
- Abusive or hostile work environment;
- Wrongful dismissal or discharge or termination of employment, whether actual or constructive;
- Breach of an actual or implied employment contract;
- Wrongful deprivation of a career opportunity, wrongful failure or refusal to employ, promote, or grant tenure, or wrongful demotion;

## Employment Practices Liability (EPL), contd.

- Employment-related defamation, libel, slander, etc.;
- Wrongful failure or refusal to adopt or enforce workplace or employment practices, policies or procedures;
- Wrongful discipline;
- Employment-related wrongful infliction of emotional distress, mental anguish, or humiliation;
- Retaliation;
- Negligent evaluation; or
- Negligent hiring, supervision, retention or training.

Claim limit is \$500,000 per claim.



## **Exclusions:**

- Claims arising from Worker's Compensation Law, Unemployment Compensation Law, Employers Liability Law, Disability Benefits Law.
- Claims attributable to the administration of, participation in contributions to, or payments from any pension or benefits plan or trust fund.
- Claims for wages, salaries, commissions, fees, bonuses, promotions, profit sharing, pensions or other employee benefits earned in the normal course of employment.





## LISA GARRETT, ESQ.

**Dentons Cohen Grigsby**Chubb EPL Panel Counsel



## **Employment Practices: Conducting Internal Investigations**

- 1. Recent Trends
- 2. Importance of Anti-discrimination/Anti-harassment Policies
- 3. Investigation Best Practices

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## **Recent Trends**

- •U.S. Equal Employment Opportunity Commission (EEOC) which is the federal agency that enforces federal anti-discrimination laws (e.g., Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, etc.) has been more active.
- •The EEOC is filing more lawsuits against employers. EEOC's initial data for FY2023 (ended September 30<sup>th</sup>) shows that the EEOC filed 143 lawsuits which was a 50% increase over the number of cases filed in FY2022.

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## **Recent Trends continued**

- The EEOC issued Proposed Enforcement Guidance on Harassment in the Workplace on September 29, 2023, with a 30-day comment period. If it becomes final, it would be the EEOC's first update on harassment since its "Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors" issued in 1999 after the U.S. Supreme Court's decisions in Faragher-Ellerth.
- Increased reports of discrimination/harassment in the form of antisemitism and Islamophobia.
- Increased instances of employers receiving complaints from outside channels, e.g., members of the public or activist groups, open letters posted on social media, etc.

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## Importance of Anti-discrimination/ Anti-harassment Policies

- Ensure legal compliance for employers.
- Under certain circumstances, enable an employer to assert an affirmative defense to claims of harassment by a supervisor.
- Articulate prohibited conduct, identify reporting procedures, advise employees that complaints of harassment will be investigated and if substantiated that effective corrective action will be taken.
- Establish and maintain a dignified workplace free of harassment which helps foster accountability, productivity, commitment and a feeling of safety for employees, among other things.

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## **Investigation Best Practices**

- Once it has notice of potentially harassing conduct, an employer is required to take
  reasonable corrective action to prevent conduct from continuing which includes
  conducting a prompt and adequate investigation and taking appropriate action based
  on the investigation findings.
- Understand when an investigation is warranted.
- Determine whether intermediate steps are necessary while investigation takes place.
- Investigation should commence promptly.
- An adequate investigation is one that is sufficiently thorough to arrive at a reasonably fair estimate of truth.

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## **Investigation Best Practices continued**

- Investigator should be impartial and well trained in skills for interviewing witnesses and evaluating credibility; certain situations may warrant engaging outside legal counsel or HR consultants to perform the investigation.
- Investigator should form a conclusion and determine whether there has been a violation of policy or the law.
- If conclusion warrants corrective action, determine the level needed to effectively eliminate conduct. With respect to employees, corrective action could take the form of counseling, written discipline, additional training, suspension or separation from employment, depending on the circumstances. With respect to non-employees, corrective action may warrant different approach.

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## **Investigation Best Practices continued**

- Inform the complainant and alleged harasser of the investigation findings and whether corrective action will be taken, and if so, what type.
- Check in with employees. Are remedial measures working? Make sure there's no retaliation for engaging in protected activity (<u>i.e.</u>, reporting harassment, participating in the investigation, filing a charge/complaint of discrimination with a federal/state/local enforcement agency).
- If receive a report of retaliation investigate and address appropriately.

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NAR General Counsel AND Vice President of Legal Affairs and Antitrust Compliance







## **JENNY LI**

Assistant General Counsel California Association of REALTORS®





## **RESOURCES**



#### NAR RESOURCES - GENERAL EMPLOYMENT

**Employer/Employee Guidelines** 

**HR for Associations** 

**Human Resources Toolkit** 

**Employment Practices Legal Hotline** 



#### NAR RESOURCES - HARASSMENT

**Good Sense Governance – Harassment** 

**Preventing and Addressing Sexual Harassment** 

**Sample Anti-Harassment Policy** 

**Best Practices for Internal Harassment Investigations** 



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#### **EPL ASSIST™**

- Access to EPL Assist<sup>™</sup> website (registration required).
- No cost, live hotline and email access to a legal expert at Littler Mendelson, dedicated to Chubb insureds.
- Library of online employment law resources, information and training videos.
- Employment law updates, and much more.

#### EPL Assist™

CHUBB.



Employers today face an array of employment laws and regulations. Whether it involves hiring, evaluating employee benefits or managing a leave of absence or termination, failing to comply with the ever-changing legal requirements can have a devastating impact on both employee morale and the company's bottom line.

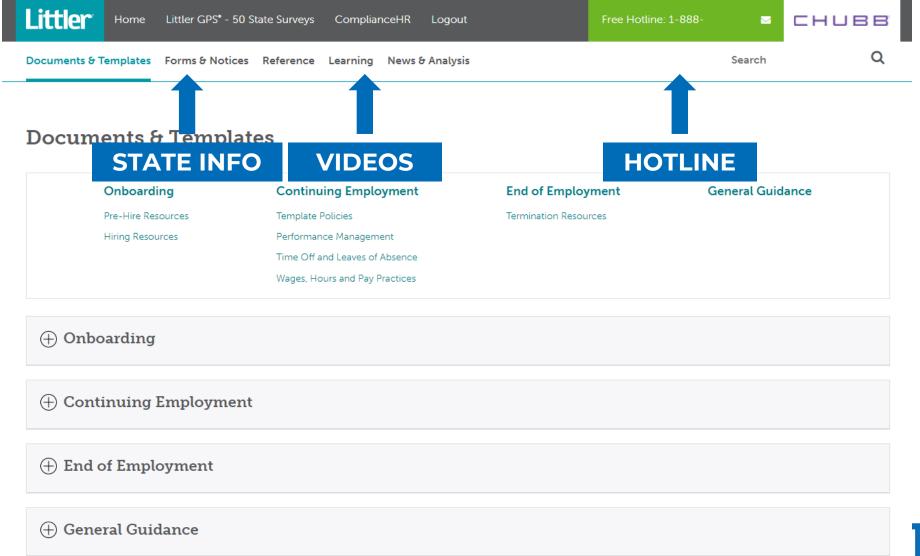
Chubb recognizes these unique burdens faced by employers, and has provided our insureds with access to the nation's premier employment and abort law firm, Littler Mendelson (Littler), to create a cutting edge employment practices risk management tool for Chubb insureds, called EPL Assist\*\*. Through EPL Assist\*\* insureds also have unlimited access to expert advice and counsel through a decicated bottline.

#### What is EPL Assist m?

EPL Assist<sup>TM</sup> is a cutting edge risk management program providing policyholders with access to a wide variety of legal content, forms and analysis, combined with the ability to interact directly with Littler lawyers dedicated to assisting Chubb insureds. Through a secure web portal containing essential employment law resources and tools, as well as the ability to email a question directly to the free assistance hotline, Chubb insureds have access to the content and advice necessary to compete in today's challenging legal environment.



#### **EPL ASSIST**<sup>TM</sup>







## To register for EPL Assist™

- 1. Visit www.EPLAssist.com/user/register.
- 2. Enter your contact information and the name of your association or MLS.
- 3. Enter the policy number MPB G23658240 016.

\*If you register in 2024, enter policy number MPB G23658240 17

It may take up to a week to receive account approval. You will receive an email with information on how to log in and set a password.

### **QUARTERLY RISK REPORT**

## **Available at** nar.realtor/narinsurance-program

## NAR INSURANCE PROGRAM **QUARTERLY RISK REPORT**

#### IN THE SPOTLIGHT:

## INTELLECTUAL PROPERTY

Intellectual property (IP) is protected by law and includes creations of the human mind, such as inventions (patents); literary and artistic works (copyright); and symbols, names and images used in commerce (trademark). The main purpose of IP law is to ensure that creators' works are not used by others for profit or personal gain, without recognition or financial benefit for the creator or owner. REALTOR® associations must take care when using the IP of others or undertaking activities that may have

Copyright protects original works of authorship, and allows the copyright owner to dictate how a work is used. REALTOR® associations may encounter copyrights from both sides: as the creator of copyrighted material such as real estate forms, educational courses, or MLS databases, and as the user of copyrighted material like images for a website or music played at an event.

Each aspect requires a risk management strategy to protect an association's works, and to avoid copyright infringement Improper use of copyrighted content can create legal problems for REALTOR® associations including cease and desist letters, demands for license payments, and litigation, with damages for willful infringement as high as \$150,000 per work. Artificial Intelligence

The use of generative <u>artificial intelligence</u> (AI) platforms presents unique questions that could shape the future of IP. Al can create content—blog posts, video scripts, articles, images, and much more—in response to user prompts, after scanning its database of millions of pieces



## **CLAIMS REPORTED: 16**

11 active demands/lawsuits | 5 potential claims

- 2 Employment
- 2 Professional Standards Discrimination
- Governance
- Defamation
- 1 Crime Loss
- 1 Other

However, using AI platforms is not without risk. The output generated by generative AI is not currently protectable under US copyright law. Failing to review the Al's output for accuracy can lead to embarrassment and even legal liability if it infringes on someone else's IP. In addition, information the user provides is used to train the Al and may be used to create content for others.

<u>Trademarks</u> are unique terms, symbols, or combinations of terms and symbols that communicate a specific message to the public REALTOR® is NAR's trademark and has only one meaning: a member of the National Association of REALTORS®. Pursuant to the three-way agreement, NAR grants each association the right to control the terms "REALTOR®" and "REALTOR®-Associate" (REALTOR® Marks) within their territorial jurisdiction.

In addition, NAR's Bylaws require REALTOR® associations to cooperate and coordinate with NAR to ensure the proper use of the marks by their members, and that their members use the NAR's trademarks in compliance with the NAR Constitution and Bylaws and the policies and guidelines set forth in the Membership Marks



#### **QUARTERLY WEBINARS**

## Available on nar.realtor/nar-insurance-program

#### **Session Replays**



October 6, 2023

Financial Guardrails for Associations



June 23, 2023 Antitrust for Associations



March 24, 2023 The Impact of DEI on Risk Management



December 8, 2022
Trending Employment Law
Issues



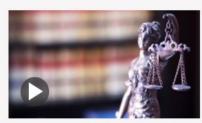
September 15, 2022

Cybersecurity: Risk &

Opportunities for...



June 10, 2022 ADA Websites: What Associations Need to Know



March 25, 2022

Defending Professional

Standards Decisions in Court



December 10, 2021

Employment Law: COVID and Beyond



September 21, 2021

Copyright: Best Practices to
Avoid Costly Claims



#### MORE INFORMATION

#### NAR INSURANCE PROGRAM

## nar.realtor/nar-insurance-program

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# THANK YOU.





