INSURANCE ISSUES FOR HUMAN RESOURCES PROFESSIONALS

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I. LITIGATION FUNDING AND WORKERS' COMPENSATION CLAIMS

A. Introduction to litigation funding.

1. Litigation funding, also known as legal financing or third-party funding, provides plaintiffs and law firms with funds to cover legal fees and living expenses while a case is pending.

2. In workers' compensation contexts, pre-settlement funding provides injured workers with immediate financial assistance while their claims are being processed.

B. How pre-settlement funding works in workers' compensation.

1. Pre-settlement funding is a non-recourse cash advance provided in exchange for a portion of a worker's potential future settlement.

2. If the worker loses the case, they are not required to repay the advance.

C. Market overview: the growth of litigation funding. The global litigation funding investment market was valued at $19.0–20.64 billion in 2024–2025, with an estimated growth rate of 8-14% through 2036.

D. Key growth drivers.

1. Rising litigation costs and complexity.

2. Increased awareness and acceptance by corporate and legal firms.

3. Institutional investor participation (pension funds, hedge funds, sovereign wealth funds).

4. Regulatory shifts and growing transparency in funding frameworks.

E. Current state of the workers' compensation industry.

1. Key trends

a. Lost-time claim frequency declined by 5% in 2024, exceeding the long-term average annual decline of 3.6%.

b. Medical and indemnity severity both increased by approximately 6% in 2024.

c. Net written premium decreased 3% to $41.6 billion in 2024.

2. Litigation in workers' compensation: a growing concern

a. According to the 2025 Annual Workers' Compensation Industry Insight Survey, slightly more than 61% of survey participants cited litigation as the top challenge facing the industry—a 14-point year-over-year increase.

b. Concerns justified. In a 2018 study, attorney involvement increased the median claim duration from 305 days to 901 days. A different study found that attorney involvement increases expense payment by 200% and increases lost time days by 284%.

c. Newer employees more likely to hire attorneys.

F. Why injured workers seek legal representation and funding.

1. Primary reasons workers hire attorneys (WCRI research): Fear of being fired when injured (48% of workers who hired attorneys); concern that their supervisor questions the legitimacy of the claim (42%); belief that the payer/insurer has denied the claim (46%).

2. Additional contributing factors: difficulty navigating the workers' compensation system; lack of communication from employer or insurer/adjuster; denial or delay of prescribed medical treatment; loss of employer-paid health insurance during claim period; lack of modified work duty opportunities.

3. Role of financial strain. Workers' compensation claims can be contested by employers and insurance companies, causing delays in paying benefits or reaching a settlement. Financial strain can add to the stress, leading injured workers to seek pre-settlement funding to make ends meet and keep up with bills.

G. Impact of litigation funding on employers.

1. Increased claim duration and costs: Litigation funding allows workers to hold out longer for larger settlements rather than accepting early offers. Insurance companies and defense attorneys may intentionally extend proceedings; litigation funding counters this but prolongs overall claim resolution.

2. Impact on workers' compensation premiums: Workers' compensation premiums are based on industry, number of employees, payroll, and claims history over the past three years. Multiple claims or high-cost claims can cause insurance premiums to increase significantly.

H. Employers fight back. Employer lobby groups are seeking increased regulation. Also, cases that don't settle pose complete capital loss risk for funders and lengthy case durations erode investor confidence and reduce capital efficiency.

II. EMPLOYMENT PRACTICES LIABILITY INSURANCE (EPLI) – CURRENT TRENDS

A. EPLI fundamentals

1. EPLI protects businesses against claims by employees alleging violations of their legal rights, including claims of discrimination, harassment, wrongful termination, and retaliation.

2. Policies typically cover defense costs, settlements, and judgments arising from employment-related claims.

3. Current market dynamics: Defending wrongful employment practices claims has become increasingly costly, with higher wages and attorneys' fees making EPLI claims more expensive. The average cost to settle a discrimination or disability claim now exceeds $125,000, and court judgments can easily double that amount.

B. AI and EPL Issues

1. According to the Society for Human Resource Management's 2025 survey, over 50% of employers now use AI in recruiting.

2. AI is being implemented across several HR processes: Resume screening; candidate assessments; video interviews; performance management; compensation decisions.

3. Legal risks: algorithmic discrimination and disparate impact. One of the biggest legal risks associated with using AI in recruitment is the concept of disparate impact—a policy or practice that seems neutral on its face but ends up disadvantaging a protected group.

   a. The EEOC has issued guidance warning that automated decision-making tools fall under the same anti-discrimination laws as traditional practices. Rescinded, but likely to come back or be implemented at the state level.

   b. The case Mobley v. Workday is a significant example, where plaintiffs argue that software discriminated against job applicants over age 40 in violation of the Age Discrimination in Employment Act (ADEA). Federal case filed in California. They submitted hundreds of applications; no interviews. The court found that there could be a class action, based on the common factor that all of the applicants were viewed through Workday's AI program.

4. State-level AI regulation

   a. Illinois' Artificial Intelligence Video Interview Act requires employers to disclose when AI is being used in video interviews and to obtain applicant consent.

   b. New York requires permission before a company can use AI-generated likenesses of employees.

   c. California and Colorado now require companies to be transparent about when and how AI influences hiring decisions.

5. Employer liability and insurance coverage

a. Employers remain responsible for compliance with anti-discrimination and privacy laws, regardless of whether errors originated in-house or through an external AI service.

b. EPLI policies may not cover certain AI-related claims unless additional riders are purchased.

c. Contracts with vendors should be explicit about risk allocation.

d. EPLI policies typically provide coverage for acts or omissions alleged to have been discriminatory, and the use or involvement of AI should not create an impediment to coverage.

6. Key AI-related EPLI concerns

a. AI for HR purposes is among the areas most likely to lead to employment-related claims.

b. Risk mitigation strategies:

i. Conduct regular bias audits of AI tools.

ii. Require human review of AI-generated outputs.

iii. Train HR professionals to identify and respond to AI red flags.

iv. Implement stronger employee education and training related to the use of AI for HR purposes.

C. EPL and the shifting DEI landscape

1. Companies' DEI policies have significantly impacted the EPLI market. DEI initiatives have prompted lawsuits claiming reverse discrimination against majority-group employees.

a. Federal regulatory and executive actions.

i. On January 21, 2025, President Trump signed Executive Order 14173, designed to combat DEI practices at the federal level and question practices among private sector employers.

ii. On March 19, 2025, the EEOC and the Department of Justice jointly issued guidance cautioning employers that certain DEI initiatives may violate Title VII of the Civil Rights Act of 1964.

iii. The guidance marked a significant shift in federal enforcement priorities, emphasizing that employment actions motivated—even in part—by an individual's race, sex, or other protected characteristic could constitute unlawful discrimination.

iv. The Supreme Court's impact: Ames v. Ohio Department of Youth Services. In a unanimous decision on June 5, 2025, the U.S. Supreme Court rejected the heightened burden test faced by plaintiffs in demonstrating "reverse discrimination" under Title VII.

D. EPL and Managing the Risk

1. Review and update coverage: Employers should ensure EPL policies cover modern exposures, including wage and hour disputes, remote work, and HR automation.

2. Insurance coverage that can respond to AI and DEI risks.

a. EPLI policies typically provide coverage for third-party claims of discrimination, and the involvement of AI does not eliminate coverage.

b. Other relevant policies may include: Commercial General Liability (CGL); Directors and Officers (D&O); Errors and Omissions (E&O); cyber insurance.

c. Risk management best practices.

d. General employment best practices:

i. Update and enforce hiring, evaluation, termination, and remote work policies.

ii. Provide regular training on harassment, discrimination, and compliance.

iii. Document employee disputes and corrective actions.

iv. Consult with legal counsel to navigate potentially conflicting state and federal requirements.

III. CYBER LIABILITY INSURANCE AND HUMAN RESOURCES

A. Why HR is a cybersecurity priority

1. The vulnerability of HR data

a. Human resources represents one of the most vulnerable cyber areas of any business. HR data found in 82% of data breaches. https://lab-1.com/anatomy

b. HR departments collect and maintain an extensive array of personally identifiable information (PII), including Social Security numbers, banking information, medical records, and personal identifiers.

c. HR data is highly valuable on the dark web.

d. Organizations frequently retain more HR data than necessary—the total notification pool following a breach may be four times the number of current employees.

2. The human element in data breaches

a. According to Verizon's Data Breach Investigations Report, 82% of data breaches involved a human element, whether through phishing, password mismanagement, or simple mistakes.

3. Internal and external threats

a. Internal threats may originate from disgruntled employees or human error stemming from a lack of defense training.

b. External threats include sophisticated attacks where cybercriminals target organizations through HR systems.

B. Understanding cyber liability insurance

1. What cyber liability insurance covers

a. Cyber liability insurance protects businesses from impacts of online incidents, including data breaches, ransomware attacks, and phishing scams.

b. First-party cyber liability insurance covers losses sustained directly by the business during an attack, including:

i. IT forensics team costs.

ii. Costs of restoring damaged systems.

iii. Notifying affected customers.

iv. Legal services.

v. Data recovery operations.

vi. Business interruption losses.

c. Third-party cyber liability insurance protects businesses from claims made by affected parties, including payments to affected parties, settlement expenses, and regulatory fines.

2. Common coverage areas relevant to HR

a. Customer/employee notifications—covers the cost of alerting customers and employees about a breach.

b. Data recovery—pays for recovery of data compromised by an attack.

c. System damage repair—covers repairing computer systems damaged by a cyberattack.

d. Legal defense—covers legal fees incurred through privacy policy violations.

e. Credit monitoring—provides credit monitoring services to affected individuals.

f. Crisis management—connects organizations with PR experts to protect reputation.

3. What cyber liability insurance does not cover

a. Poor security processes where an attack occurred as a result of poor configuration management.

b. Prior breaches or events that occurred before a policy was purchased.

c. Human error by an organization's employees.

d. Insider attacks where an employee was responsible for the incident.

e. Preexisting vulnerabilities that the organization failed to address.

f. Technology system improvements such as hardening applications and networks.