

PROPERTY & CASUALTY

Looking Ahead: EPL Claims Trends to Watch for 2024

2024 | Adenola Adedigba, Claims Analyst



In many ways, claims trends for employment practices liability (EPL) follow broader social and economic shifts we see daily. External factors, such as the ongoing #MeToo movement, the rise in pay transparency laws and the increasing use of technology in the workplace, can impact an employer's potential exposure to legal activity. Highlighted below are current and developing topics relating to employment practice litigation and insurance for companies as risks evolve.

Artificial Intelligence Discrimination and Failure to Hire Charges

The Equal Employment Opportunity Commission's (EEOC) Strategic Enforcement Plan for 2024 advised that it will continue to prioritize protecting workers from employment discrimination in recruitment and hiring practices as artificial intelligence (AI) has an increasing presence in the workplace.ⁱ The agency demonstrated this priority in 2023 after issuing guidance within its Artificial Intelligence and Algorithmic Fairness Initiative. In August 2023, the EEOC settled its first-ever discrimination lawsuit involving AI hiring software for \$365,000 for allegedly rejecting female and male applicants aged 55-60.

As a result, state legislatures are focused on regulating the use of AI software in the workplace to address discrimination and other protected rights adversely impacted by AI-related tools.ⁱⁱ For example, Illinois and

Maryland enacted laws limiting the use of specific AI technologies in the workplace. Last summer, New York City passed an ordinance regulating the use of AI-driven tools in hiring and promotion decisions.ⁱⁱⁱ At least four other states and municipalities, including California, New Jersey, Vermont and the District of Columbia, are also working on laws to regulate the use of AI in hiring.^{iv}

Biometric Privacy Lawsuits

Biometric privacy litigation is another emerging issue that presents challenges in the workplace. Many employers use biometric data in their timekeeping practices, with a few states and cities having biometric laws on the books that require businesses to track, inform and seek employee consent when collecting these identifiers. States like Illinois, Texas and Washington, as well as New York City and Portland, Oregon, have all implemented biometric privacy laws to protect employees and consumers.^v

ⁱ US Equal Employment Opportunity Commission, *Strategic Enforcement Plan Fiscal Years 2024 – 2028*, (2023).

ⁱⁱ *EEOC v. iTutorGroup Inc.*, E.D.N.Y., No. 22-cv-02565

ⁱⁱⁱ Jim Paretti et. al., *New York City Adopts Final Regulations on Use of AI in Hiring and Promotion, Extends Enforcement Date to July 5, 2023*, Littler Mendelson P.C. (April 13, 2023).

^{iv} Amber M. Rogers & Michael Reed, *Discrimination in the Age of Artificial Intelligence*, American Bar Association (2021).

^v *Is Biometric Information Protected by Privacy Laws?*, Bloomberg Law (May 3 2023).



In Illinois, the Biometric Information Privacy Act statute (BIPA) is the source for numerous lawsuits, including the recent case against Ingalls Memorial Hospital.^{vi} In November 2023, the Illinois Supreme Court weighed in on a pair of class action suits brought by two nurses who alleged that their employers violated BIPA by requiring the use of fingerprint scanners to gain access to a medication-dispensing system that provided medication to patients. In a win for the defendants, the Court ruled that the healthcare workers' biometric information used to access medication-dispensing stations for patient care fell under the healthcare exemption and is not subject to BIPA's requirements.^{vii}

Although there is no federal biometric privacy law, the Federal Trade Commission has issued a policy statement on the collection and use of biometric information – an indicator that, on a national level, they could use their authority to target biometric collection practices considered deceptive or unfair.^{viii} In the EPLI space, there's a growing trend for insurers to add biometric exclusions to their EPL policies and push these biometric privacy claims to cyber policies for coverage.^{ix}

Pay Transparency, Pay Equity and DEI Programs

Employees are becoming more assertive in enforcing their rights around pay discrimination and equal pay. Emerging pay transparency laws provide plaintiffs with comprehensive data to support these claims.^x Several states have enacted pay transparency laws, including California, New York, New Jersey and Colorado. The increase in pay transparency may reveal unlawful pay discrimination, exposing employers to litigation surrounding pay equity.

While pay and promotion equity claims are often made alongside claims for discrimination or other workplace violations, there has also been a rise in discrimination claims related to corporate diversity, equity and inclusion (DEI) initiatives. In the wake of the Supreme Court's decision invalidating affirmative action at American colleges and universities, lawsuits challenging private employers' diversity and inclusion programs have been filed nationwide.

^{vi} *Mosby v. Ingalls Memorial Hospital et. al.*, No. 1-20-0822 (2020).

^{vii} *Kathleen L. Carlson et. al.*, *In a Win for Defendants, Illinois Supreme Court Holds That Healthcare Exemption Under BIPA Is Not Limited to Patients' Biometric Information*, *Sidley Austin LLP* (Dec. 5, 2023).

^{viii} *Matthew D. Provance & Britteny L. Leyva*, *Federal Trade Commission Issues Policy Statement on Biometric Information*, *Mayer Brown*, (May 31 2023).

^{ix} *Daphne Zhang*, *Insurers Add Biometric Exclusions as Privacy Lawsuits Pile Up*, *Bloomberg Law* (June 30 2022). *v Is Biometric Information Protected by Privacy Laws?*, *Bloomberg Law* (May 3 2023).

^x *Robert Sheen*, *Pay Equity Claims Are On The Rise: How Can Employers Navigate Complex Legislation?*, *JD Supra* (Jul 14 2023).

Heightened awareness of DEI may invite heightened scrutiny of such initiatives and lead to more discrimination claims regarding such initiatives.^{xi}

Increase in Regulatory Scrutiny

The EEOC was highly active in 2023, as shown by the sharp increase in merit filings compared to 2022, and the EEOC's 2023 fiscal year ended with 143 merit lawsuits, with nearly half (71) filed last September alone.^{xii} This represents a significant increase from the number of 2022 filings (94) and 2021 filings (114).^{xiii} The number of charges filed with the EEOC is also beginning to rise. It can be anticipated that the severity of claims will escalate due to economic and social inflation.^{xiv}

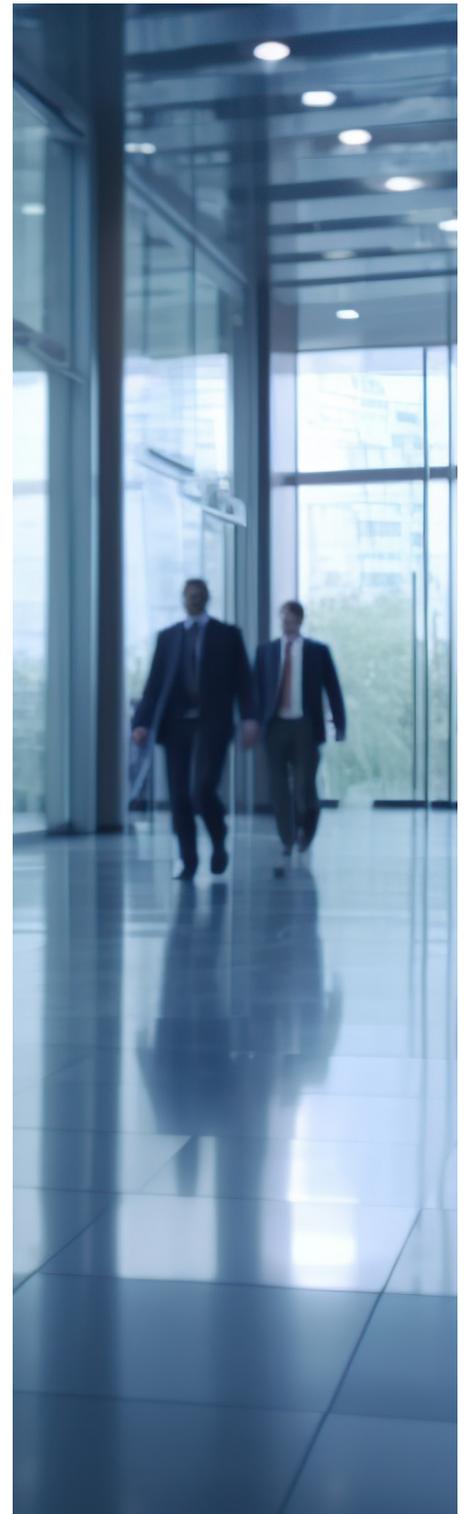
The EEOC has also signaled increased interagency cooperation between its agency and the U.S. Department of Labor. Last September, the EEOC and the U.S. Department of Labor announced they had executed a memorandum of understanding to enable information sharing, joint investigations, training and outreach.^{xv} From this cooperation, employers should expect that reported data may be shared between the two agencies and anticipate more scrutiny regarding employment practices that violate federal law.

State legislatures also took an active role in 2023, amending wage and hour laws regulations. These amendments include establishing increased hourly minimum wage rates and requiring employers to post the hourly rates and/or salaries for open positions. This development may make it more challenging for national companies to establish uniform wage and pay transparency policies since they operate in multiple jurisdictions with local laws that are incongruent with one another.^{xvi} Some examples include city and/or state-specific pay transparency rules, unique state and/or city background check rules and increased local bans on noncompetition agreements.^{xvii}

In Conclusion

When reflecting on the overall EPL claim trends in 2023 and EEOC renewed recovery efforts, activity in the EPL space may likely increase in 2024. As such, employers are encouraged to proactively minimize exposure to workplace discrimination, harassment and retaliation claims.

Brown & Brown Risk Solutions offers innovative solutions to companies seeking to address these risks with comprehensive and tailored insurance coverage. We recommend consulting with a seasoned insurance specialist to ensure your company's employment practice policy responds to the evolving risks in the workplace.



^{xi} John L. Litchfield, *EEOC Previews FY 2023 Litigation Trends with a Focus on Its Strategic Enforcement Plan*, Foley & Lardner LLP (Oct. 16 2023).

^{xii} Christopher J. DeGroff et. al., *EEOC Litigation in Overdrive: Deciphering the EEOC's FY2023 Case Filing Spike*, Workplace Class Action Blog, Seyfarth Shaw LLP, (Oct. 1, 2023).

^{xiii} Gerald L. Maatman et. al., *EEOC Finishes Fiscal Year 2021 With September Surge Of Filings As Commission Recovers From Pandemic-Fueled Slowed Down*, Seyfarth Shaw LLP, (Sept. 30 2021).

^{xiv} Claudine English, *5 Employment Litigation Trends Companies Need to Address*, Zurich (Jul. 28, 2022).

^{xv} US Equal Employment Opportunity Commission, *Memorandum of Understanding Between the U.S. Department of Labor, Wage and Hour Division and the U.S. Equal*



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