***Insurance Times*:** Service/retail employers being hit with privacy suits

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NEW YORK— More frequent lawsuits and higher jury awards are taking place in the millennium, hitting the service/retail industry the hardest. Stemming from high unemployment, a better educated workforce and managers who don't know how to manage risk, the plaintiff's bar is trying cases more successfully than ever before, according to panelists at the LPL/EPLI Symposium, sponsored by the Professional Liability Underwriting Society.

In 2002, the plaintiff's bar had a 67 percent chance of success in defending a case, up 17 percent since 1994, said Randall J. Karuse, chief executive officer, YourHrdepartment, Inc., Los Angeles. "There must be policies and procedures in place that protect a company against retaliation," he said.

Krause, who has been an employment attorney for more than 15 years, noted that workplace privacy is a key area where there is an increase in employment claims.

"Privacy lawsuits have increased 300 percent in the last 10 years, partly due to the information age," he said. "There's more information out in the world today on all of us and a tremendous increase in the access, storage, transfer and delivery of information in the past 10-15 years," he said. "Computer software, the Internet and email has changed the way we store information. With all this new technology, there is greater access and abuse of information."

Krause noted that in a survey of companies, it was found that 85 percent of employees use email at work for personal business and 67 percent of employers report problems with employees sex surfing.

Among large employers, Krause said that 73 percent now monitor email and only 40 percent of those employers have privacy policies in place. "Employees often expect some level of privacy in the workplace," he said. "If an employee has a reasonable expectation of privacy, and no policies are in place, then there is cause for a suit."

According to Krause, violations of employee privacy often lead to claims for wrongful termination, harassment discrimination and other employment claims. "These claims can be expensive and can include statutory and punitive damages, attorneys fees and other litigation costs under federal and state statutes."

"The good news," said Krause, "is by lowering employees expectations of privacy you will lower the risk and cost of privacy-based claims. This can be accomplished through effective privacy policies, education and training of both employees and managers and consistent enforcement."

A growing trend is the increase in individual liability for sexual harassment, said Denise I. Murphy, attorney with Boston-based Nelson, Kinder, Mosseau & Saturley, P.C. "Plaintiffs' bar are more adept at trying cases. Depending on the state, not only can the employer be liable, but so can the employee, co-worker or supervisor. Individuals typically don't have EPLI and are at risk for not only their reputation, but their financial well-being."

Murphy said that an employee can be charged with aiding and abetting activity if they knew about a discrimination situation and did not conduct an investigation. "As a result, that individual is also responsible and can be liable for punitive damages."

In addition to aiding and abetting statutes, plaintiffs are now being brought up on sexual assault charges because criminal trials are faster to try than civil trials, cautioned Murphy. "Sexual assault is a felony," she explained. "If you plea bargain, you will be considered a sex offender under Megan's law, and will have to register with your local policed station and are basically ostracized for life."

Looking at arbitration, Paul J. Siegel, Esq., partner, Jackson, Lewis, Schnitzler & Kruptman, Woodbury, N.Y., said that a verdict is not the biggest number to be concerned with when underwriting. "Legal fees for defense and the plaintiff's legal fees can more than double the cost, which you have to consider when underwriting."

Siegel noted that when evaluating a case, it is important to realize the more complex the case, the more it will cost. "That's why arbitration can sometimes be more attractive."

While arbitration can be less costly in some ways, it can be more expensive in other cases, explained Siegel. "With a federal case, you don't rent-a-judge, but you do rent an arbitrator at a cost of approximately $3,000 per day. In six to seven days that can be close to $20,000."

In addition, if the arbitrator makes a "bad decision" not in the defense's interest, there is no appealing, according to Siegel. "If you understand these laws, it's winner takes all."

That's why jury waivers (non-jury trials) should be considered, Siegel explained. "If you don't agree with the outcome, you can always go to trial."

Jack McCalmon, JD, president, The Agos Group/Labor Consultants of America, Tusla, Okla., added that companies "can write successfully, but only if they have effective loss control measures in place."

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