North America Financial Lines: Employment Practices Liability

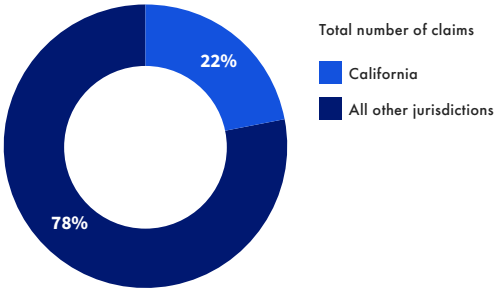
This edition of the AIG's Claims Intelligence Series focuses on differences in employment practices liability (EPL) exposures and claim outcomes for companies with California employees and the implications for risk management. Our analysis draws on data from approximately 20,000 claims noticed on EPL policies issued in the U.S. and Canada from 2018 through 2022.

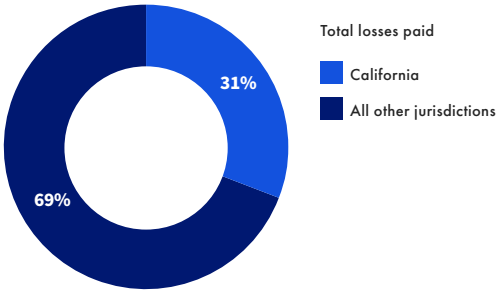
At a glance

- California employment laws make it especially challenging to prevent and defend EPL claims; subtle differences in these laws can have an outsized impact on exposure.
- The average paid loss for a claim in California was 41% higher than the average loss in all other jurisdictions.
- Companies with operations in California, or with employees attending meetings or other events in the state, often face the same large-scale exposures as those headquartered in-state.
- California-headquartered companies tend to achieve claim results superior to non-California-headquartered companies in EPL claims in California and outside California.
- The superior outcomes for California-headquartered companies underscore the inverse relationship between sensitivity to EPL risks and severity of EPL claims.
- Investing in the resources to understand and mitigate the severe EPL exposure in California makes a significant difference in EPL claim outcomes, whatever the venue.

The California Climate

EPL claims made in California are the most expensive in the country. These claims accounted for 22% of all EPL claims and 31% of total losses paid during the time period studied. The average paid loss for a claim in California was 41% higher than the average loss in all other states.





The average paid loss for a claim in California was:

41%

higher than the average in all jurisdictions

60%

higher than average in all jurisdictions other than CA

All EPL losses for all companies in all jurisdictions

Category	Aggregate Loss ($)	Average Loss per Claim ($)	Aggregate Claim Count
All EPL losses, all companies	715,795,885	32,725.09	21,873
CA EPL losses, all companies	224,033,278	46,221.02	4,847
All EPL losses other than CA losses, all companies	491,762,607	28,883.04	17,026

California employment laws are generally considered to be the most expansive in the country. Consequently, both preventing and defending claims in the state are particularly challenging. California has the most restrictive variances from Title VII, the federal law that prohibits employment discrimination.

Seemingly small nuances in California laws tend to have an outsized impact on exposure. A case in point is the definition of disability discrimination. In claims brought under California's Fair Employment and Housing Act (FEHA), a plaintiff is required to have an impairment that limits a major life activity. In contrast, claims brought under the federal Americans with Disabilities Act (ADA), a plaintiff is held to a higher burden of proving that a disability "substantially" limits one or more important life activities. Additionally, unlike the ADA, FEHA does not require an employee to prove that the employment action was motivated by animus or ill will.

California's EPL environment is also shaped by a preponderance of employee-friendly caselaw. For example, courts have narrowed the traditional 'severe and pervasive' legal standard in sexual harassment cases, lowered the burden of proof, and stated that that these cases are rarely appropriate for summary judgment.

The cost of California litigation is also inflated by generous punitive damage awards made by employee-friendly juries and bountiful plaintiffs' legal fees. California also has fee-shifting statutes, which allow a plaintiff to recover all their attorneys' fees if awarded any monetary damage at trial. All of these factors discourage plaintiffs' counsel from settling claims, which often results in extended litigation and increased defense costs.

Better Outcomes, In State & Out

California's challenging EPL environment doesn't just put California-headquartered companies at heightened risk. Companies that have any California headcount or companies that have employees visit the state for meetings or other events must navigate the same climate. **These non-California-headquartered companies suffer markedly worse EPL claim outcomes than California-headquartered companies.**

Companies headquartered in California fare better than their out-of-state counterparts in EPL claims in California.

Results of EPL claims in California

Category	Aggregate Loss ($)	Average Loss per Claim ($)	Aggregate Claim Count
CA loss of non-CA companies	171,749,863	47,171.07	3,641
CA loss of CA companies	52,283,415	43,352.75	1,206

Overall Losses

The average loss (defense costs plus indemnity) for EPL claims in California incurred by companies headquartered in California is 9% less than the average incurred by companies headquartered outside California. This is especially compelling considering how a greater headcount and executive presence (and salaries) in California significantly heighten the exposure for California companies.

Category	Aggregate Loss ($)	Average Loss per Claim ($)	Aggregate Claim Count
All EPL losses other than CA losses, all companies	491,762,607	28,883.04	17,026
All EPL loss other than CA loss, non-CA companies	476,521,087	29,134.33	16,356
All EPL loss other than CA loss, CA companies	15,241,520	22,748.54	670

Non-California companies have average outcomes 28% more severe than California companies in EPL claims outside of California.

Looking at the five costliest states for EPL claims after California – New York, New Jersey, Texas, Illinois, and Florida – California-based companies again outperformed the rest, with their average claim cost 22% less than companies headquartered outside of California.

Jurisdictions	CA Companies: Average Loss per Claim ($)	Non-CA Companies: Average Loss per Claim ($)
All jurisdictions	**22,748.55**	**29,134.33**
CA	43,352.75	47,171.07
FL	12,003.93	18,720.68
IL	51,728.24	48,292.08
NJ	22,342.05	30,611.18
NY	33,393.14	29,214.47
TX	15,586.74	28,062.62

CA-headquartered companies also have lower severity on average in most other high severity jurisdictions.*

*Illinois experience is affected by significant losses in connection with the Biometric Illinois Privacy Act.

Best Practice Considerations

The fact that California companies outperform their non-California peers in EPL claims in all jurisdictions is testimony to the inverse relationship between sensitivity to EPL exposure and severity of EPL claim outcomes.

When a company is headquartered in California, a jurisdiction with especially large EPL exposure, that employer will likely have a heightened corporate sensitivity to the risk, as well as an appreciation of nuances of employment practices laws and judicial and jury behavior. This awareness and sensitivity typically drive investment in guidance and training, better internal controls, education, and policies – and diligence in keeping the same updated.

These companies are also likely to purchase EPL insurance from an insurer with excellent experience managing and defending EPL claims in California and elsewhere. They are likely to take all claims seriously and engage immediately to manage them, knowing how quickly they can escalate. Understanding the importance of creating consistent environments for employees across the organization, they are likely to instill these same high-level practices, procedures and tools across their employee universe and geographic environments.

The fact that California companies outperform their out-of-state peers in EPL claims in all venues is testimony to the inverse relationship between sensitivity to EPL exposure and severity of EPL claim outcomes.

Case Studies

North Carolina Company, Southern California Claim

A North Carolina-headquartered company with less than 5% of its approximately 3,000 employees located in California had a lawsuit brought in Southern California by a software engineer. The employee alleged race discrimination, racial harassment, retaliation, and wrongful discharge, all in violation of California's FEHA. Since California had recently moved away from the "severe and pervasive" standard for harassment claims, the plaintiff need only prove that a reasonable person subjected to the discriminatory conduct would find that the harassment so altered working conditions as to make it more difficult to do the job. This matter settled for just over $350,000.

Florida-based Company, Large Settlement in CA

This Florida-based business has more than 100,000 employees worldwide, only 5% in the U.S., and less than 2% in California. The plaintiffs who worked in California alleged that their employer allowed male clients to harass them by not responding to complaints made to Human Resources about the harassment. They also alleged that their complaints about the clients were erased from the client profiles maintained by their employer. The plaintiffs alleged sexual harassment, failure to prevent sexual harassment, wrongful termination/constructive discharge, and retaliation. Due to the low threshold for harassment in California, the matter settled for over $1.5 million, incurring $500,000 in defense fees.

Missouri-based Company Mired in California Case

The plaintiff was terminated after less than three years of employment and two cease and desist demands for using a third-party email and contact tracking list, which was not approved by the Missouri-based company for employee use. The plaintiff filed a lawsuit alleging age discrimination, harassment based on age, retaliation based on age, hostile work environment, unfair and unlawful business practices, and wrongful termination in violation of public policy. In California, an employee need not prove an actual violation of law; a reasonable suspicion of illegal activity can suffice. In this instance, the employer had a legitimate reason for terminating the plaintiff for violating its security policy. While the reason for termination was legitimate, there were concerns the plaintiff could use information about subsequent workforce diversity analyses to make a prima facie showing, and the matter was settled.

Michigan-based Multinational Settles Claim

This claim was made against a Michigan-based company, which had approximately 10,000 U.S. employees and only 300 in California. The plaintiff, who was employed by the company for less than two years, filed a lawsuit alleging 14 causes of action for pregnancy discrimination, pregnancy harassment, disability discrimination, retaliation, wrongful termination, and intentional infliction of emotional distress. The plaintiff sought general damages, special damages, economic damages, interest, punitive damages, exemplary damages, liquidated damages, attorney fees, injunctive relief, and costs.

The claim stemmed from allegations that plaintiff's supervisor made numerous harassing comments about plaintiff's pregnancy. After returning from a six-month maternity leave, the plaintiff alleged that she began to experience pregnancy-related complications and was advised by her doctor to work from home for approximately four months or take a medical leave of absence. The plaintiff alleged that she sought reasonable accommodations from her supervisors, but they said they could not accommodate her because the plaintiff would not be able to perform the essential functions of her job from home. The plaintiff alleged that she complained to her Benefits Manager and that the insured retaliated against her by demanding she return to work. She asserted that when she challenged these directives she was ultimately terminated by the plaintiff. This matter settled at mediation for a high six-figures amount, with defense costs also in the six-figures.

The AIG organization pioneered Employment Practices Liability Insurance decades ago and has steadfastly advanced coverage and services to protect our customers as exposures have increased and evolved across the country and around the world. Our extensive knowledge, resources, and data enable us to tailor solutions to our client's individual needs. AIG's financial strength, integrated claims model, and proven claim expertise ensure that we are there, helping to drive the best possible outcomes for our clients.

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