

# ATLANTIC COUNTY MUNICIPAL JOINT INSURANCE FUND

## Administrative Policies & Procedures

Adopted: December 15, 2010

**POLICY:** Employment Practices Probation Program

**PURPOSE:** To Establish a Procedure for Placing and Removing Members from Employment Practices Probation

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Employment liability claims present the most challenging issue facing the Joint Insurance Fund. Based on civil rights violations these claims encompass wrongful termination, harassment, hostile work environment, CEPA (whistleblower), failure to promote, and similar allegations. Two factors make these claims extremely costly to settle and defend:

1. Fee shifting wherein plaintiff's attorney is entitled to all of his/her legal fees if a cause of action is proven
2. Reluctance of plaintiff's attorneys to settle cases of nominal value due to potential for disproportionate award of legal fees

According to our claims professionals and defense panel members, most of these claims are preventable and/or highly defensible if basic procedures and practices are followed including:

1. An unequivocal commitment from top management
2. Adoption of policies prohibiting discriminatory behavior
3. Distribution of policies to all employees
4. Regular updating of above policies
5. Existence of an effective complaint structure
6. Prompt and effective investigation of complaints
7. Mandatory training for all supervisors
8. Availability of training for all employees

In cooperation with the Municipal Excess Liability Joint Insurance Fund, the JIF has developed tools for every member to become compliant with the above criteria including:

1. Sample Policies
2. Sample Handbooks
3. Managerial and Supervisory Training
4. Elected Officials Training
5. Videos and Leaders Guides
6. EPL Hotline

Despite the availability of the above resources, many members are served with these suits and we find ourselves unable to defend the member for failure to enforce and utilize the policies and tools enumerated above. In addition, many times investigation of these claims reveals that the members failed to review their intended actions with Labor Counsel or disregarded their own policies in an employment related matter. In these cases the Fund will carefully scrutinize whether a member should continue to be covered for employment related claims when they fail to review intended personnel actions with Labor Counsel.

Another troubling trend is that in many cases we find that unacceptable behavior has been permitted to continue with explicit or tacit knowledge of top officials and management and either nothing has been done to stop it, or, there is little or no documentation supporting that action. Perhaps the most important element in preventing these claims is AN UNEQUIVOCAL COMMITMENT from top management to support these programs. In cases where it is apparent that upper management is unwilling to enforce compliance with personnel policies and procedures and the utilization of EPL resources, the Fund will carefully scrutinize whether a member should continue to be covered for employment related claims.

Due to the high cost that these claims present to individual members and to the JIF as a whole, the following policy has been adopted.

#### **1. PURPOSE:**

The Employment Practices Liability Probation Program is designed to enable the Executive Committee to take effective action to assist members in avoiding or mitigating potential claims when there is evidence that a member's actions or activities in the area of human resources is deficient. The Program is designed to provide feedback to members who, by virtue of their claims history or lack of commitment, require assistance in adopting policies, practices, and procedures that will create a workplace that is free of harassment and other employment related issues.

#### **2. EMPLOYMENT PRACTICES LIABILITY COMMITTEE:**

The Employment Practices Liability Committee was established by the Executive Committee by adoption of a Committee Charter. Serving on the Employment Practices Liability Committee shall be:

- a) The Chairs of the Claims Review Committee, Coverage Committee, Finance Committee, Operations & Planning Committee, and Safety Committee.
- b) A member of the Executive Committee as appointed by the Executive Committee Chair.
- c) At least two additional Fund Commissioner be appointed by the Executive Committee Chair.
- d) The Fund Attorney, Fund Claims Administrator, Safety Director, and a representative from the Administrator's office.

The Committee shall serve as a focal point for discussion on issues pertaining to employment practices liability claims. The Committee shall advise the Executive

Committee on issues pertaining to the source, amount, and types of claims and their financial impact on members, on the Atlantic JIF, and on the MEL. The Committee shall review observational, statistical, and historical information presented by the Fund Professionals and shall recommend policies to be adopted and actions to be taken to eliminate, reduce, or mitigate the financial impact of these claims on the membership.

The Committee is to meet as many times per year as the Committee Chair deems necessary, but no less than quarterly, at the discretion of the Chair.

Members of the Committee shall be present at all meetings. As necessary or desirable, the Chair may request that other Fund Commissioners, Fund Professionals or consultants attend to participate in discussions of particular issues.

### **3. PROBATION:**

The Committee shall review claims data and accept reports from Fund Professionals regarding members' claims and compliance with programs designed to eliminate or reduce the practices that may lead to employment practices claims. Where a member has incurred claims that give rise to concern because of their frequency, nature, or circumstances, the Committee shall discuss appropriate action designed to reduce the likelihood of future claims. In considering a member for Probation, the Committee shall consider but not be limited to the following considerations:

#### **A. Claims History**

The Committee will regularly review each member's claims history to identify trends that may indicate a deficiency within that municipality's Employment Practices Liability program. The following claims data will be considered in the periodic reviews:

- Loss Ratio higher than 100%
- Two or more claims within a three year period
- Trends in claims types, departments, and/or involving the same named defendants

Claims that the member has successfully defended with no payment to plaintiff or plaintiff's counsel will not be counted in the above determination. No member will be placed on Probation solely as the result of a poor claims history.

#### **B. Failure to Qualify for MEL EPL Status**

At least once every two years, and intermittently as needed, members must update their Employment Policies and Procedures in accordance with guidelines established by the MEL and/or the Atlantic JIF. Failure of a member to update their Personnel Policies and Procedures as recommended can make it difficult for the Atlantic JIF and/or the MEL to defend employment related claims brought against this member.

#### **C. Lack of Management Support**

Evidence suggests that employment related claims can be eliminated if upper management supports the adoption, training, and implementation of employment policies and procedures within a municipality. The implementation of these policies creates a workplace environment that is free from harassment and treats all employees fairly. A lack of upper management support can be documented as follows:

- 1) Failure of elected officials to attend annual training seminars
- 2) Failure of managers and supervisors to attend bi-annual training seminars
- 3) Failure to adopt the recommended Personnel Policies and Procedures
- 4) Failure of Elected Officials and management to address issues that have given rise to past claims or have a likelihood of leading to future claims.

#### **D. Fund Professional Review**

The opinion of Fund Professionals including members of the Fund's Defense Panel, Claims Administrator, and Executive Director's office can be valuable in identifying individual member practices or tendencies that might lead to a claim. If in the opinion of a Fund Professional, a member is undertaking activities or personnel practices that could lead to an employment liability claim, the Fund Professional shall report this activity to the Committee for review and action. In addition, a member will be considered for Probation if, in the opinion of a defense counsel member or Fund Professional, the practices that led to the allegations could have been clearly prevented or have allowed for a successful defense of a claim or claims.

#### **E. Member Request**

Nothing in this policy shall preclude a Fund Commissioner from requesting a meeting between the member municipality and representatives from the EPL Committee if the Fund Commissioner believes activities within the municipality might lead to an employment related claim.

### **4. Probation Procedures**

Once a member has been identified by the Committee as having qualified for EPL Probation based upon the criteria established above, the Committee will meet to discuss the member town and the specific circumstances leading to the Probation recommendation. Following the meeting, the Committee shall report its findings to the Executive Committee with a recommendation to place a member on EPL Probation.

If a member is placed on Probation, the EPL Committee shall arrange for a meeting with the member's Fund Commissioner, top Administrative Personnel, Solicitor, and Elected Officials to discuss the Committee's concerns and the EPL Probation process. Representatives from the EPL Committee attending the member meeting shall include

a representative from the Administrator's office, the Fund Solicitor, and at least two (2) Fund Commissioners that are members of the EPL Committee.

Items to be discussed with the member municipality include the following:

- 1) The Fund's concern(s) that led to the Probation designation
- 2) The source or reason for the claims that led to the Probation designation
- 3) Goals & Objectives that the member must attain within a predetermined timeline in order to be removed from Probation
- 4) The expectations of the Fund that the member will cooperate fully in defending known claims and implementing remedial action(s) to deter future claims
- 5) The potential consequences should the member town refuse cooperate as outlined in #3 and 4 above.

Upon completion of the meeting, a letter memorializing the meeting and outlining mutual agreement and understandings shall be prepared by the Fund Solicitor with assistance from the Fund Administrator's office. The letter shall include at a minimum the following information:

- 1) Those present at the meeting
- 2) An Action Plan to be undertaken by the member municipality to reduce the likelihood of future claims or to allow for the successful defense of claims
- 3) A timeline for completion of the Action Plan including a timetable for the completion of interim reports
- 4) Notification that failure to address the Action Plan shall lead to further action that may include elimination of EPL Coverage for the member or other actions permitted in the Bylaws of Plan of Risk Management.

This correspondence shall be sent to the member municipality no later than 14 days following the date of the meeting.

The member shall be asked to confirm in writing their understanding of the Action Plan.

## **5. Status Reports to the EPL Committee**

The Fund Solicitor, Executive Director, or Claims Administrator shall provide the Committee with a report at each meeting on the status of those members that are currently on Probation and those members recommended for Probation.

## **6. Removal from Probation**

The goal of the Employment Practices Liability Probation Program is improve the member's compliance with adopted policies and employment related activities so as to eliminate the potential for employment related claims. A member that is placed on Probation shall be provided an opportunity to improve their performance and remedy

such matters that resulted in Probation status. The remedial actions will be provided in a timely manner, will be specific, and will include a timetable for completion. Each member on Probation will be required to provide the Committee with a monthly update on the status of their Action Plan. These updates will be reviewed by the Fund Solicitor and shall be provided to the Committee.

Nothing in this policy shall preclude members of the EPL Committee from meeting with a member on Probation in order to assist in complying with the Action Plan.

## **7. Failure to Comply with Committee Recommendations**

If a member fails to comply with the agreed upon Action Plan, the Committee shall meet to discuss appropriate steps including:

1. Written notification to the member that they have violated their probation and asking the member to "show cause" as to why EPL coverage should not be terminated.
2. Request for a meeting with the Governing Body of the member municipality
3. Implementation of a surcharge on the member
4. Imposition of higher deductibles and co-payments upon the member municipality
5. Elimination Employment Practices Liability Coverage for the member municipality.
6. Non-Renewal of the member municipality in accordance with the provisions in the by-laws.

The Committee report their findings and recommendations to the Executive Committee as soon as practicable. The Executive Committee shall further direct the EPL Committee as to further action to be taken.