

# **LEGAL INTERMEDIARIES: HOW INSURANCE COMPANIES CONSTRUCT THE MEANING OF COMPLIANCE WITH ANTI-DISCRIMINATION LAWS**

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## **Author Biography:**

Shauhin Talesh is assistant professor of law, sociology, and criminology, law & society at the University of California, Irvine. He is an interdisciplinary scholar whose work spans law, sociology, and political science. His empirical studies address the intersection between organizations, risk, and legal regulations, focusing on private organizations' responses to and constructions of laws that are designed to regulate them. His broader research interests include the empirical study of law and organizations, dispute resolution, consumer protection, insurance, and the relationship between law and social inequality.

## **ABSTRACT**

Existing empirical research suggests that human resource officials, managers, and in-house counsel influence the meaning of anti-discrimination law by communicating an altered ideology of what civil rights laws mean that is colored with managerial values. This article explores how insurance companies play a critical and as yet, unrecognized role in mediating the meaning of anti-discrimination law through Employment Practice Liability Insurance (EPLI). My analysis draws from, links, and contributes to two literatures that examine organizational behavior in different ways: new institutional organizational sociology studies of how organizations respond to legal regulation and socio-legal insurance scholars' research on how institutions govern through risk. Through participant observation at EPLI conferences, interviews, and content analysis of insurance loss prevention manuals, my study bridges these two literatures and highlights how the insurance field uses a risk-based logic to construct the threat of employment law and influence the form of compliance from employers. Faced with uncertain legal risk concerning potential discrimination violations, insurance institutions elevate the risk and threat in the legal environment and offer EPLI and a series of risk-management services that build discretion into legal rules and mediate the nature of civil rights compliance. My data suggest that insurance risk management services may sometimes be compatible with civil rights goals of improving equality, due process, and fair governance in workplace settings, but at other times may simply make discrimination claims against employers more defensible.

## INTRODUCTION

Civil rights and employment laws impose liability on employers for wrongful employment practices and seek to protect an employee's right to a workplace free of discrimination and harassment. These laws recognize that employees deserve recourse for acts of discrimination committed against them and that monetary penalties are effective tools in deterring such discrimination. Existing empirical research of employer responses to anti-discrimination laws by new institutional organizational sociologists, however, reveals that employers mediate what employment law means in action. These studies show that ideas about law and compliance that originate with the professions (managers, human resource officials, and in-house lawyers) become institutionalized among employers and, over time, generate a diffusion of new organizational practices that are influenced by managerial values (Edelman, Fuller, and Mara-Drita 2001; Marshall 2005). While new institutional scholars highlight how managers and human resource professionals mediate and managerialize law through conferences, networking, and professional personnel literature, they have yet to explore the role that insurance and in particular, insurance institutions, play in constructing the meaning of compliance with anti-discrimination law.

This omission is significant because the vast majority of employers have sought ways to shift risk and responsibility away from themselves by purchasing insurance. While most forms of business insurance explicitly exclude coverage for liability arising out of employment practices, the insurance industry in the early 1990s introduced a product called Employment Practices Liability Insurance (EPLI). EPLI filled this gap in coverage by providing employers with the means to manage the perceived litigation risk associated with discrimination, sexual harassment, and other breaches of employment law. While there is some variation in policies,

EPLI provides insurance defense and indemnification coverage to employers for claims of discrimination (age, race, sex, disability), wrongful termination, sexual harassment, and other employment-related allegations made by employees, former employees or potential employees.<sup>1</sup> Whereas previously employers exclusively bore these damages payable to injured employees, EPLI now allows employers to pass these costs to insurance companies, who charge a premium to offset their liability.

EPLI almost immediately enjoyed astonishing success (Gabel et al. 2001). Since EPLI policies were first sold in 1991, the number of insurance companies offering EPLI policies has grown from five to over fifty-five (Gibson 2000; Chaney 2001; Betterley Report 2012). The volume of business (measured by the gross written premiums) for insurers offering EPLI is approximately 1.6 billion dollars in the United States, and 500 million dollars outside the United States (Betterley 2012). The majority of large employers have EPLI and many mid-size business owners also purchase some form of EPLI (Betterley 2012). Moreover, coverage under EPLI has expanded over time as well. These policies now cover retaliation, defamation, invasion of privacy, some intentional acts, and sometimes punitive damages against employers. While EPLI is an institutionalized practice among both insurers and insurance-related institutions that offer, market, and sell this product, and among employers who purchase this insurance, there has been little empirical research evaluating how the insurance industry, through EPLI, constructs the meaning of compliance with anti-discrimination law.

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<sup>1</sup> The insuring agreement in a typical EPLI policy provides that the insurance company will pay on behalf of the insured for “damages” in excess of the deductible arising out of any “employment practices” to which the insurance applies. In a typical EPLI policy, “damages” means monetary amounts, but does not include fines, injunctive relief, punitive damages, or judgments awarded due to acts uninsurable by law. However, as this article shows, the definition of damages has been expanded over time.

My theoretical framework for answering this question drew from two literatures that examine organizational behavior and decision-making in different ways: (1) new institutional organizational sociology studies of how organizations respond to legal regulation; and (2) socio-legal insurance scholars' studies of how institutions govern through risk. Whereas prior new institutional studies focus on how the professions "managerialize" the meaning of employment law (Edelman, Erlanger, and Lande 1993, Edelman, Fuller, and Mara-Drita 2001), insurance law scholars focus on how formal considerations about risk direct organizational strategy and resources (Baker and Simon 2002).

My study bridges these two literatures by exploring how insurance companies and institutions, through EPLI and the accompanying risk management services that they offer, construct the threat of employment law and try to influence the nature of civil rights compliance. Drawing from participant observation and ethnographic interviews at EPLI conferences across the country and content analysis of EPLI policies, loss prevention manuals, EPLI industry guidelines, and webinars, my empirical data suggest that insurance companies and institutions, through EPLI, use a risk-based logic and institutionalize a way of thinking anchored toward risk management and reduction. Faced with uncertain and unpredictable legal risk concerning potential discrimination violations, insurance institutions elevate the risk and threat in the legal environment and offer a series of risk-management services that they argue will avert risk for employers who purchase EPLI. Conferences, training programs, loss prevention manuals and insurance policy language provide an opportunity for insurance field actors to build discretion into legal rules and recontextualize anti-discrimination laws around a non-legal risk logic that dominates discourse concerning what constitutes discrimination. In this setting, risk and managerial values work in a complimentary manner because my data reveal that the insurance

field uses risk-based logics to encourage employers to engage in managerial responses such as developing policies and procedures. While my data suggest EPLI and the series of risk management services offered with the insurance policy can potentially improve employment practices and compliance, it also suggests that EPLI risk management services may at times shape compliance in a way that leans more toward making claims defensible rather than fostering a discrimination-free workplace.

#### **NEW INSTITUTIONAL AND RISK-BASED APPROACHES TOWARD STUDYING ORGANIZATIONS**

New institutional organizational sociology and socio-legal insurance scholars emphasize different mechanisms for explaining organizational behavior and decision-making. New institutional theories of law and organizations examine organizational responses to the legal environment (Dobbin et al. 1993; Sutton et al. 1994). The civil rights movement and the mandates of the 1960s altered organizations' legal environments by raising societal attention to equality, due process, and fair governance. Contrary to rational approaches, institutional perspectives suggest organizations adopt a variety of legal structures in response to institutionalized rules or normative practices that have become widely accepted among "organizational fields" (Edelman 1990, 1992). The construct of an organizational field refers to the community of organizations and affiliated entities, including suppliers, customers, competitors, that share common systems of meaning, values, and norms (Meyer and Rowan 1977; DiMaggio and Powell 1983; Scott 2002).

New institutional organizational sociology studies reveal how law becomes managerialized as values such as rationality, efficiency, and management discretion operating within an organizational field influence the way in which organizations understand law, legality, and compliance (Edelman, Fuller, and Mara-Drita 2001). Prior new institutional research shows

that the professions are key carriers of ideas among and across organizational fields. In particular, human resource officials, personnel managers, management consultants, and in-house lawyers communicate ideas about law as they move among organizations and participate in conferences, workshops, training sessions, professional networking meetings, and publish professional personnel literature (Jacoby 1985; Baron, Dobbin, and Jennings 1986; Abzug and Mezias 1993; Edelman, Erlanger, and Lande 1993; Edelman, Fuller, and Mara-Drita 2001; Edelman et al. 2011). These forums offer opportunities for the diffusion of new solutions to perceived managerial problems such as the threat of employment lawsuits (Edelman, Abraham, and Erlanger 1992; Bisom-Rapp 1996, 1999). Existing empirical research reveals how managerial conceptions of law broaden the term “diversity” in a way that disassociates the term from its original goal of protecting civil rights (Edelman, Fuller, and Mara-Drita 2001), transform sexual harassment claims into personality conflicts (Edelman, Erlanger, and Lande 1993), deflect or discourage complaints rather than offer informal resolution (Marshall 2005), and even shape the way public legal institutions such as legislatures (Talesh 2009, 2014), courts (Edelman, Uggem, and Erlanger 1999; Edelman 2005, 2007; Edelman et al. 2011), and arbitration forums (Talesh 2012) understand law and compliance.

Socio-legal insurance scholars explore how institutions—insurance or otherwise—“govern through risk” (Baker and Simon 2002). Baker and Simon refer to governing through risk as “the use of formal considerations about risk to direct organizational strategy and resources” (Baker and Simon 2002, 11). This concept simultaneously encompasses not only the use of risk-based principles by insurance companies, but the use of insurance technologies and concepts to govern risk outside of insurance institutions.

Empirical studies in the past twenty years reveal how the insurance industry plays an active role in constructing the meaning of risk and responsibility in different segments of society. Through policy language, pricing, and risk management services, liability insurance companies engage in loss prevention and regulate the behavior of actors and organizations (Heimer 2002, Baker 2005; Ericson, Doyle and Barry 2003; Baker and Griffith 2010; Ben-Shahar and Logue 2012; Abraham 2013). Insurance-as-governance studies highlight how insurers manage moral hazard in property and fidelity relationships (Heimer 1985), govern security in the home (O'Malley 1991), impact the motion picture industry in the United States (Hubbart 1996-97), and influence risk management approaches toward campus drinking (Simon 1994). In the case of medical malpractice, insurance serves to shift risk and responsibility away from doctors, however inflated the threat of medical malpractice might be (Baker 2005). In other settings, insurance impacts insured behavior much less. For example, although insurers offering directors and officers insurance have an opportunity to influence the behavior of directors and officers and discourage wrongful or even illegal behavior, they seldom do (Baker and Griffith 2010).

Moving beyond insurance institutions and traditional settings where insurance is sold, risk-based principles are increasingly incorporated into organizational decision-making and behavior (Baker and Simon 2002; Heimer 2002; Ewald 2002). For example, social service agencies target at-risk children (Health and Human Services 1994), community policing approaches target high-risk areas (Ericson and Haggerty 1997), environmental engineers conduct risk assessments of hazardous waste sites and other sources of environmental concern (Graham and Weiner 1995), and fraternities redefine gender relations in response to the risk of sexual harassment (Simon 1994).

In sum, new institutional and insurance socio-legal scholars rely on different theoretical approaches and consequently, emphasize different mechanisms for explaining organizational influence over law and society. However, little new institutional research in this vein explores the role that insurance and in particular, insurance institutions, play in shaping way in which organizations understand law and compliance (cf. Schneiberg 2002, Schneiberg and Soule 2004). Moreover, new institutional scholars for the most part have not evaluated the manner in which risk-based logics and principles influence the way that professional intermediaries such as the insurance industry discuss compliance with employment.<sup>2</sup> Conversely, governing through risk scholars have not explored the micro-processes and mechanisms through which insurance or formal considerations of risk are used to influence organizational behavior in the employment law context.

My study blends these two literatures. In particular, I import the governing through risk approach into new institutional studies of law and organizations by revealing *how* risk-based logics and principles that are institutionalized by the insurance field influences what employers are told anti-discrimination laws mean. However, I also expand the governing through risk framework by exploring how institutionalized values, norms, and logics developed within the insurance field are used by the insurance industry to influence organizational strategies and decisionmaking.

## METHODOLOGY

My research design evaluated how, through EPLI, the participants in the insurance field, *i.e.*, insurance companies, claims administrators, brokers, agents, risk management consultants,

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<sup>2</sup> Although there are a few new institutional studies in this area that mention litigation threat or risk, new institutionalists have yet to engage in a comprehensive exploration of the processes through which risk narratives influence the meaning of compliance (Edelman, Abraham, and Erlanger 1992; Dobbin et al. 1993).

underwriters, product managers, in-house counsel, and employment and insurance attorneys, construct the meaning of compliance with anti-discrimination laws and advise employers on how to comply with these laws. A series of sub-questions guided my inquiry: (1) How does the insurance industry frame employees' discrimination complaints and characterize the objectives of anti-discrimination laws?; (2) What extralegal criteria does the insurance field use to determine what constitutes discrimination?; and (3) How do formal considerations of risk impact the way that the insurance field evaluates what anti-discrimination laws mean? To answer these questions, I needed to "study up" (Nader 1969; Morrill 1995) and penetrate a field that is often not easily accessible to social science research. Because unfettered access was unrealistic and preliminary inquiries revealed industry officials were resistant to formal in-depth interviews, I used different sources of data from a variety of locations.<sup>3</sup> Through participant observation at conferences where insurance field actors come together and interact, ethnographic interviews with insurance field actors across the country, content analysis of primary sources such as EPLI webinars, EPLI insurance policies, insurance industry reports, and loss prevention manuals, I explored how the meaning of anti-discrimination law gets constituted, deployed, and contested by organizations and individuals involved in drafting, marketing, and selling EPLI. Because I do not have data on how EPLI impacts actual employer behavior, or whether EPLI and the value-added services that insurers offer leads to more or less discrimination by employers, my data focus on how the insurance field understands and communicates what anti-discrimination law means to those that they interact with.

### *Participant Observation at EPLI Conferences*

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<sup>3</sup> Both in writing and in-person, I requested formal, recorded, in-depth interviews with forty-three insurance field actors. The vast majority declined though many were willing to speak more informally. Thus, ethnographic interviews proved to be a more effective interviewing approach (Spradley 1979).

I attended four national conferences on EPLI over a period of two years. EPLI conferences are three-days, occur two to three times a year, and bring together various actors engaged in employment practices liability to discuss important issues. These conferences have been occurring for over twenty years. EPLI conferences are where the majority of actors involved in drafting, marketing, buying, and selling EPLI engage one another. EPLI conferences allowed me to observe the field and to explore how various organizational actors think about EPLI and anti-discrimination laws, to document what logics or frames were dominating the discourse as participants discussed EPLI, and explore how field actors use EPLI to influence what anti-discrimination laws mean to employers and insurance industry officials that attend such conferences. EPLI conferences were very useful because these conferences focused on educating and training participants on what EPLI is and how to use it to help employers defend against various state and federal employment law claims.

EPLI conferences were typically held at hotels. Approximately 45 to 65 insurance field actors attended these conferences. The attendees consisted of approximately 60% men and 40% women. Panel sessions occurred daily and brought attendees together in one conference room.<sup>4</sup> Conference rooms were set up much like a classroom with a podium and table for discussants in the front of the room and rows of tables and chairs for audience members to sit and take notes.

### *Ethnographic Interviews*

My observations at the annual EPLI conferences that I attended allowed me to identify various field actors and pursue informal, ethnographic interviews. Ethnographic interviewing is a type of qualitative research that combines immersive observation and directed one-on-one interviews (Spradley 1979). Because these interviews occur in the interviewees' natural settings

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<sup>4</sup> There was never more than one panel session going on at a time.

while they are performing their normal tasks, these interviews are less formal. While at the conferences, I conducted twenty-nine ethnographic interviews with field actors. These interviews varied in length from five to thirty minutes and generally involved eliciting opinions about EPLI and anti-discrimination law from (1) insurance agents, (2) brokers, (3) claims administrators, (4) insurance company executives, and (5) attorneys. I asked each interviewee to offer his or her perspective on the purpose of EPLI. Moreover, interviewees discussed the interplay between EPLI and various anti-discrimination laws. Finally, I evaluated how, if at all, risk-based logics and principles influence the way that field actors understood the purpose of EPLI and its relationship to anti-discrimination laws.

#### *Webinars*

I observed, transcribed, and coded four EPLI webinars administered by risk management consultants and brokers, insurance industry EPLI experts, and human resource professionals or attorneys. These webinars simultaneously market EPLI and educate webinar participants on what EPLI is, how EPLI is used, and highlight the various risk management services that are provided to employers that purchase EPLI. Similar to my evaluation of EPLI conferences, EPLI webinars allowed me to explore how various organizational actors discuss the interplay between EPLI and anti-discrimination laws, and to document what logics or frames were dominating the discourse as participants discussed EPLI.

#### *Content Analysis From Primary Sources: Loss Prevention Manuals and Industry Guides*

I analyzed insurance industry loss prevention manuals and insurance industry guidelines on EPLI. Loss prevention manuals instruct insurance officials, claims administrators, and in-house counsel on how to effectively use EPLI insurance. Unlike loss prevention manuals,

insurance industry EPLI guidelines are generated by independent risk management consultants.<sup>5</sup> Both types of documents are drafted by a mix of employment and insurance industry experts and attorneys specializing in insurance. Similar to EPLI conferences, these documents continuously intersect insurance and law. EPLI guidelines contain chapters on the history and status of employment practices liability, the frequency and economic impact of wrongful employment practice charges, risk management, loss prevention, insurance coverage for employment practices, underwriting and application considerations, and insurance policy formation and analysis. Because loss prevention manuals are written to guide in-house counsel, employers, and insurance company claims administrators, they provide detailed guidelines and recommendations concerning how EPLI can be used to comply with anti-discrimination laws.

In terms of data collection, I purchased all three current EPLI industry guides. I was also able to obtain three loss prevention manuals from various insurers.<sup>6</sup> In particular, documentary data were consistent with my findings at conferences, webinars, and during interviews.

#### *Evaluation of Industry Reports and EPLI Policies*

Because there is little empirical work by law and social science scholars that explore EPLI, I purchased two years of industry reports and executive summaries by risk management consultants who conduct research on the kinds of EPLI coverage offered by insurers. The most well-known report is the “Betterley Report,” named after the risk management consultant who administers the survey and drafts the executive summary and full report. These reports are given great deference by insurance field actors. The Betterley Report was repeatedly referenced by

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<sup>5</sup> Risk management consultants are experts who can be hired on a project or retainer basis to help solve specific risk management issues and problems for companies. These consultants do not sell insurance and are not affiliated with entities that sell insurance. Rather, these intermediaries provide expertise and advice on insurance policy design and coverage, self-insurance, claims management, and loss prevention.

<sup>6</sup> Insurance companies typically do not publish their loss prevention manuals.

participants in webinars, conferences, and interviews as providing some level of authority on the current state of the EPLI insurance market. Thirty-six insurers that offer EPLI responded to Betterley's survey. The Betterley Report provides a comprehensive review and analysis of the differences in insurers' EPLI coverage and capacity. In particular, the Betterley Report provides information concerning which insurers provide EPLI defense and indemnity coverage for punitive damages, wage and hour claims, and intentional acts. In addition to these reports, I also obtained and evaluated EPLI policies. While most EPLI policies have similar provisions, some vary with respect to the categories mentioned above. Information concerning insurance policy provisions provided another avenue to examine how the insurance industry uses EPLI to influence the form of compliance with anti-discrimination laws.

### *Coding*

I used a "grounded theory" approach to develop a theoretically-informed explanation that emerged directly from the data (Charmaz 2001). Following standard procedures and protocols for qualitative research, data analysis proceeded from coding, to developing conceptual categories based on the codes, to defining the conceptual categories, and finally clarifying the links between the conceptual categories (Charmaz 2001; Lofland et al. 2005; Fielding 1993). In particular, I first open coded (Lofland et al. 2005). Under this coding approach, written data from fieldnotes and insurance industry documents were coded line by line (Charmaz 2001). I initially created some preliminary substantive coding categories around actors encountered in the field, activities observed in the field, variation in written EPLI materials produced by insurance actors. My coding was designed to systematically denote the actors, activities, and locales that characterize the insurance field, and explore: (1) the ways in which the meaning of law was framed, shaped, and communicated by insurance field actors at conferences, interviews, and in

written materials; and (2) how insurance actors advise those attending conferences to comply with anti-discrimination laws.

“Focused” coding (Charmaz 2001) led me to refine my coding into analytic categories and identify how risk-based principles and values filter the way that insurance actors discuss compliance with anti-discrimination laws. In order to address the traditional critique that qualitative fieldwork does not sufficiently reveal the analytic coding process (Fielding 1993), I used qualitative coding software (ATLAS.ti) to code my written materials, interviews, and fieldnotes. While at all times I identified the codes, analyzed, and interpreted the data, ATLAS.ti assisted with organizing my data and added an additional layer of transparency, systematization, and formality to my coding process.

While no one method used in this study provides enough data to reveal conclusive findings, I am confident that triangulating across multiple sites and examining different data points led to reliable findings about how insurance actors and companies, through EPLI, construct the meaning of compliance with anti-discrimination law. There is certainly more work that can be done in the future. For example, exploring how the strategies and legal frames communicated during EPLI sessions are interpreted and deployed by employers would expand this analysis. My qualitative fieldwork, therefore, should be treated as a starting point for evaluating the micro-processes and mechanisms through which the insurance industry generates the meaning of public legal rights.

#### **HOW THE INSURANCE FIELD MEDIATES THE MEANING OF COMPLIANCE WITH ANTI-DISCRIMINATION LAWS**

The following explores how insurance companies and institutions, through EPLI, use a risk-based logic to construct the meaning of compliance with anti-discrimination law for employers who purchase this insurance. Conferences, primary sources, and interviews reveal

that insurance institutions frame the legal environment of employers as having three risk-based problems: (1) employers face uncertain legal risk in terms of unpredictable and vague anti-discrimination laws that do not provide clear markers or guidance on what it means to comply, (2) employers' risk is elevated due to increased threat of litigation and aggressive inquiries by the EEOC and plaintiffs, and (3) employers must do whatever they can to reduce or avert these risks. By framing the legal environment in such a manner, the insurance field creates a space to encourage employers to purchase EPLI and use the various risk-management services offered by insurers to help reduce these risks.

*A Legal Environment Where Employers Face Uncertain Legal Risk*

The insurance field frames employers' legal risk, *i.e.*, the risk of loss to an organization based on some violation of law, as uncertain, vague, and unpredictable.<sup>7</sup> Risk uncertainty is achieved primarily by demonstrating the complex differences of state-by-state approaches to discrimination laws and the evolving nature of federal employment law. The EPL Book, the leading EPLI manual used by industry field actors, notes at the outset of its manual the extreme variation in state employment laws: "While two states may each prohibit discrimination on a particular basis, the extent of the protection afforded, the process for the employee to make a claim and the possible remedies available against the employer may vary widely" (Griffin et al. 2001, 17). Table 1 reveals how the insurance field frames the challenges employers face in terms of uncertain legal risk:

**Table 1**  
**Examples of Insurance Industry Framing of Uncertain Legal Risk**

"The only consistent and reliable aspect of personnel laws and regulations is that they are in constant state of flux. Federal and state legislatures frequently enact new
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<sup>7</sup> The finding that the insurance field frames employers' legal risk as uncertain is similar to prior new institutional studies that conceptualize employment law as ambiguous (Edelman 1992, Edelman, Abraham, and Erlanger 1992). However, in this case, the uncertainty is generated by the insurance field as opposed to scholars' interpretation of anti-discrimination laws.

legislation and amend existing statutes. Courts continuously reinterpret the meaning of established labor laws.” (Griffin et al. 2001:88, 91)).

“Even human resource professionals can be frustrated when they attempt to make sense of labor laws that contradict each other” (Griffin et al. 2001:91).

“Even though a narrow definition of discrimination may be acceptable to some insureds, an uninsured exposure might exist when new laws are passed or new protected classes are created” (The EPL Book:270).

“Today, relations between employer and employee are governed by a complex and constantly changing body of laws and regulations. . . The complexity of laws, courts, and agencies enhances the importance of EPLI for employers” (PLUS: EPLI-In Focus 2012:2-5).

“Sexual harassment exists when a reasonable individual of complainant’s sex and sexual orientation would be offended by the conduct or language complained of. Such a standard may clearly be open to substantial debate and second guessing if the requested date results in subsequent litigation. . . There is not always a bright line between a relationship that is consensual and one that isn’t” (The EPL Book:23).

Conference panels also spend considerable time emphasizing the vague and unpredictable legal provisions of many employment laws. On a panel dealing with the Americans with Disabilities Act, insurance industry professionals and lawyers highlight the uncertain legal risk that employers face: “It is hard for employers, hard for insurance companies, hard for everyone to know what essential functions are, what constitutes a major life activity, undue hardship, or the interactive process” (EPL Cf. 32, 200-4). When discussing the importance of having an effective reporting process for employee complaints, panelists acknowledged that the law is unclear concerning what constitutes a complaint and when a complaint has been made: “If an employee says my supervisor is difficult, is that a complaint? My supervisor is abusive. Is that a complaint? I need to express my breast milk. Is that a complaint? My health insurance plan does not cover everything it should. Is that a complaint? We have little guidance on when a complaint actually occurs” (EPL Cf. 33, 345-53). Although some insurance industry panelists explain how they understand particular legal provisions, panelists often emphasize uncertain legal risk.

*A Legal Environment Where Employers Face an Elevated Risk of Lawsuits*

In addition to focusing on how employers face uncertain, vague, and unpredictable laws, insurance field actors tell employers that they face an elevated and heightened risk of being sued (cf. Edelman, Abraham, and Erlanger 1992; Dobbin et al. 1993). Table 2 highlights how field actors routinely discuss the growth, burden, and cost of employment lawsuits in documentary data and webinars:

**Table 2**  
**Examples of the Insurance Industry Framing Employer Risk of Lawsuits as Elevated**

“Every organization with employees is at risk for employment-related lawsuits. Some estimates indicate that 50% of companies with over 50 employees do not have EPLI, and that three out of five businesses will have an EPLI lawsuit within the next five years” (PLUS: EPLI: In Focus 2012: 1-6).

“Not-for-profit corporations and public entities, in addition to public and private businesses, are experiencing an explosion of employment-related claims” (The EPL Book:1).

“The Supreme Court’s decisions in these cases signal an increased likelihood that an organization may be held vicariously liable for sexual harassment committed by supervisors and managers” (The EPL Book:7).

“I wouldn’t let my daughter run a lemonade stand without EPLI” (EPL Cf. 4, 543-46).

“In light of today’s increasingly litigious environment, it is not unusual to find a variety of common-law tort, quasi contract, or other state law claims attached to a complaint alleging discrimination, sexual harassment, or wrongful discharge” (The EPL Book:35).

“The news today is filled with charges, counter charges, and huge awards arising from employment practices issues. In fact, employees are probably one of the greatest liability challenges in business today. Whether the charges involve discrimination due to race, sex, or age, wrongful termination, or sexual harassment, the results can be financially devastating. A worker in Iowa was awarded \$85 million, another in Milwaukee, \$26.6 million” (CPA EmployerGard, Employment Practices Claims Causing Concerns).

“In addition, the cost to successfully defend employment disputes can be enormous. Even so-called nuisance suits can cost 25,000 dollars or more just to defend, and very large verdicts and settlements in excess of 100 million are not unheard of” (The EPL Book:64).

Insurance industry executives at conferences refer to plaintiffs as “frustrated” and “desperate” and the EEOC as “scary” and “aggressive.” To support these claims, panelists often show videos from the EEOC website of EEOC employees encouraging claimants to bring forward claims. The insurance field also emphasizes increasing perils facing employers:

As of May 1, 2009, the Equal Employment Opportunity Commission had a backlog of over 100,000 discrimination complaints and the average complaint took more than a year to handle. In 2009 over 12,000 complaints of sexual harassment were filed. Settlements for cases exceeded \$50 million, and the defense and lawyer costs were several times this number... In the current economic climate, not only are EPLI claims increasing, but so is the potential financial risk to your company if you are not covered with quality EPLI insurance. The potential cost of a discrimination claim can threaten the future viability of your business. Most importantly, employee-related claims are on the rise, and these EPLI claims include a number of different issues (Web., EPLI Sol., 2).

Finally, insurance actors frame litigation risk as inevitable:

From what I can gather, if you've got 100 employees, you can expect to get sued once every three years... There are two types of organizations out there. Those who have been sued and those who are going to be sued. We don't know when, we don't know for how much and it's only luck of the draw how bad it's going to be. I've seen many plaintiffs who should have settled for \$25,000 but it was war. They were never going to be happy (Web., 1011-1022).

In sum, insurance field actors at conferences and in written documents elevate or heighten the risk of litigation, frame plaintiffs and the EEOC as aggressive, and discuss the increased costs of defending and/or settling employment disputes.

*A Legal Environment Where Employers Should Reduce and Avert Risk*

Once the insurance field frames the legal risks facing employers as uncertain but elevated and likely to occur, the insurance field encourages employers and risk management consultants to avert or reduce this risk by purchasing EPLI insurance and the accompanying risk management services. Panels and webinars follow almost a uniform formula: discuss the vague, complex and uncertain legal risks facing employers, discuss the growth, costs, and inevitability of lawsuits, and then discuss how to reduce employment practice liability exposure by purchasing EPLI. Table 3 illustrates examples of how the insurance field encourages employers to reduce risk by using EPLI's risk-management services:

**Table 3**  
**Examples of Insurance Industry Calling for Employers to Reduce and Avert Risk**

“But because the frequency and severity of EPL claims is rising, the importance of a coordinated risk management approach, including the consideration of specialized EPL insurance, should not be overlooked” (The EPL Book:70).

“Growing perils involving employment, disgruntled shareholders, mergers/acquisitions, government investigations, ERISA violations and employee dishonesty require more innovation and more flexibility among insurance programs and providers. At the same time, businesses want less complication. They want to make easier choices, and feel secure about their course of action. E-Risk Services has developed comprehensive insurance solutions and products that offer the versatility, simplicity and security today’s businesses are seeking” (E-Risk Services).

“Risk Management Programs: One way many insurers help their policyholders is through risk management services and resources. While the services offered may vary, the aim to help employers become more knowledgeable and proactive about their employment practices risks to reduce the number of claims and the amounts of the losses that do occur. Using effective risk management techniques creates a win-win situation because the employer has access to resources that would otherwise be unavailable or cost-prohibitive. At the same time the insurer reduces its loss exposure” (PLUS-Employment Practices Liability Insurance-In Focus).

“Every employer needs clear policies and procedures to protect against liability and define the rights of employees and employers. Instantly create a professional and customized employee handbook that is tailored specifically to your organization’s size and state. Save thousands of dollars and weeks of work. Don’t wait for a lawsuit to start thinking about harassment prevention. Take advantage of this online training that covers 18 different topics including sexual harassment to properly identify and handle issues. This training may help you satisfy various state mandated training requirements. **But, we offer it to employers nationwide as a valuable risk reduction tool.** There is not enough time to read wordy newsletters. The monthly updates get right to the point with a simple hyperlink to the question and case of the month, federal and state news updates and ask your question.” [E-Risk EPL Helpline, lines 32-41] (emphasis added)

“In response to the escalation in EPLI litigation and the financial risk to small businesses for EPLI claims, [our organization] offers our partner companies’ expertise and experience in relation to Employment Practices Liability and finding the best in EPLI third-party coverage. By pooling our power, [we are] able to negotiate an EPLI program that makes sense for your company. The shared liability solution can and will work for you.” (EPLI Insurance-SL)

(emphasis added)

Whereas prior research demonstrates how employment management professionals are influenced by their training and location in the organization and covet discretion and other managerial values (Edelman, Erlanger, and Lande 1993, Edelman, Fuller, and Mara-Drita 2001; Marshall 2005), insurance actors frame the legal environment in terms of risk reduction:

“Employers and shareholders need cost certainty. You should insure as much as possible. EPLI is a product that protects and controls risk” (EPL Cf. 4, 442-69). The institutionalized emphasis

on risk reduction is demonstrated by panel topics chosen for EPLI conferences. Table 4 highlights how the panel titles for an EPLI conference held in 2013 expressly make risk aversion and reduction an explicit component of virtually all the panels:

**Table 4**  
**EPLI Conference Panel Titles**

The Evolution of EPLI Policies: Views from the Brokers, Carriers and In-House Labor and Employment Counsel on Claims Trends, Minimizing Claims, Controlling Costs and the Current Pulse of the EPLI Marketplace.
<b>Adapting to Expanded Regulatory and Enforcement Efforts Relating to Employment Practices: How Companies Should Prepare for and Respond to Supervision in a Multi-Agency Environment</b>
2013's Pivotal Supreme Court Decisions and Legislation Affecting the EPLI Realm
The Impact of Social Media in the Workplace: Benchmarking Best Practices and Policies in Today's Cyber-Culture
Current Trends in Workplace Harassment and Discrimination: Transgender, Racial, Age and Gender Claims
<b>Retaliation and Whistleblowing: How Employers Can Prevent This Increasingly Prevalent Threat, and Responding to the Latest Claims</b>
<b>Wage and Hour and EPLI: Assessing How the Market has Responded to Coverage Needs and Best Practices for Mitigating Exposure to Claims</b>
<b>Risk Management and Avoidance: Everything Insureds, Counsel, and Insurers Now Need to Know, With a Deep Dive into Early Case Assessment and Resolution</b>
The Triangular Relationship of Carriers, Insureds, and Defense Counsel: Ensuring Ethical Conduct in the Management, Litigation, and Settlement of EPL Claims

(emphasis added)

In sum, unlike prior studies that explore how employment management professionals emphasize diversity, flexibility, and managerial rhetoric (Edelman, Erlanger, and Lande 1993; Edelman, Fuller, and Mara-Drita 2001; Marshall 2005), the insurance field emphasizes that employers face a legal environment filled with uncertain legal risk, an elevated risk of litigation, and a need to reduce risk. By framing employers' legal environment in terms of risk, the insurance field creates a space to encourage employers to engage in managerialized responses and develop formalized procedures by using the various risk-management services offered by

insurers to help mitigate these risks. Similar to prior new institutional studies (Edelman, Fuller, and Mara-Drita 2001), these logics are institutionalized within the insurance field through professional networking, conferences and training materials.

The following section highlights *how* the insurance industry uses EPLI and the accompanying risk management services that it offers employers to build discretion into legal rules and recontextualize legal rules around a non-legal risk logic anchored in shifting risk and responsibility off of employers and on to insurance companies that offer EPLI. As this process occurs, the insurance field mediates the meaning of compliance with anti-discrimination laws for employers in ways that at times may be compatible with civil rights goals of improving equality, due process, and fair governance in workplace settings, but at other times may simply make discrimination claims against employers more defensible (cf. Bisom Rapp 1996, 1999). For a processual explanation of how the insurance field uses a risk-based logic to construct the meaning of compliance with anti-discrimination laws, see Figure 1.

**Figure 1**

## How the Insurance Field Uses Risk to Construct the Meaning of Compliance with Anti-Discrimination Laws

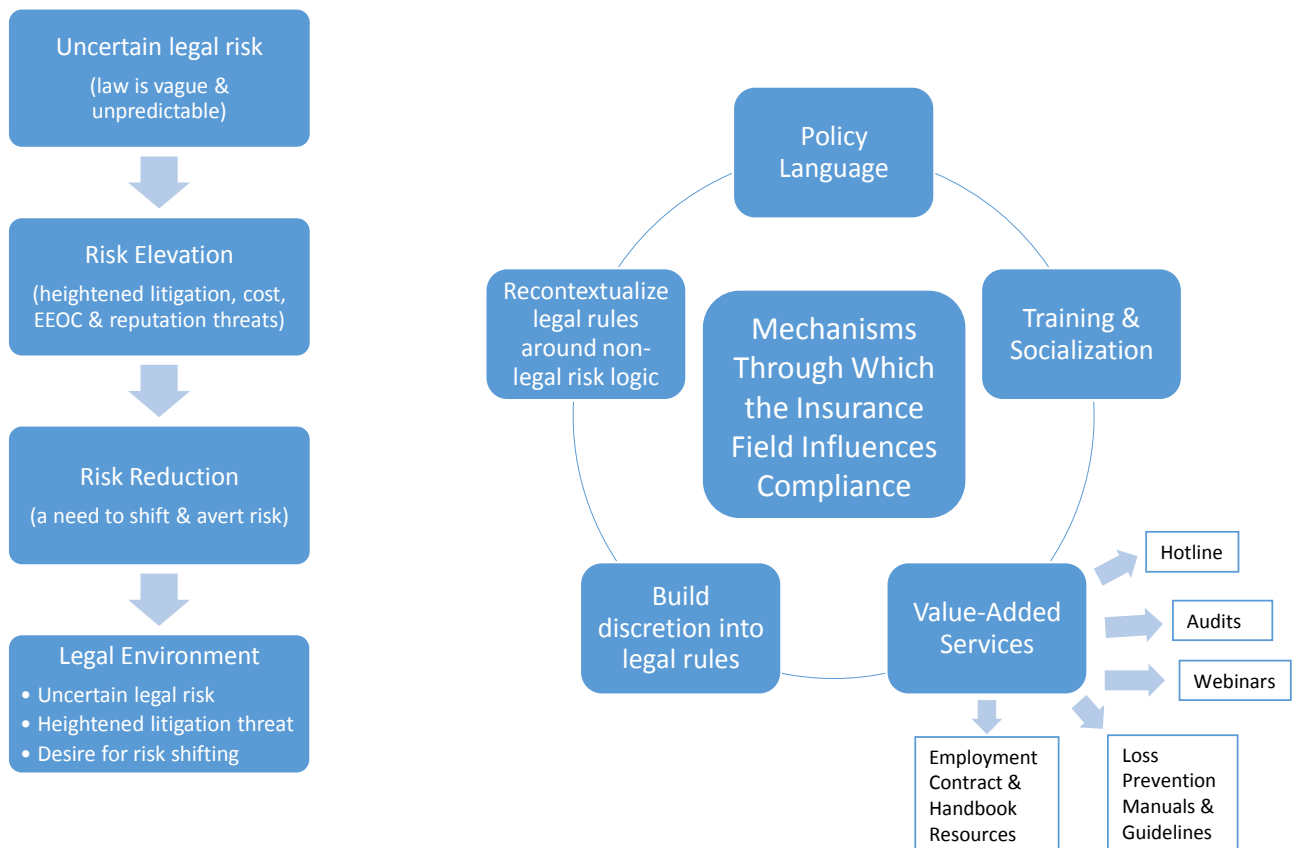


Figure 1 illustrates the mechanisms through which the insurance field attempts to influence compliance with anti-discrimination laws. The insurance field first constructs the legal environment that employers encounter as uncertain, facing an increased chance of litigation, and therefore, a need for risk reduction. By framing employers' legal environment in this manner, it allows the insurance field to offer employers EPLI and a series of risk management services that construct what compliance with law means. Risk-based logics are used to encourage employers to engage in managerial responses and develop formalized procedures.

### *Insurance Companies Use Policy Language to Build Discretion into Legal Rules*

EPLI insurers mediate what anti-discrimination laws mean through insurance policy language. In particular, insurance companies draft EPLI policies in ways that build discretion into formal legal rules. In other words, even though the law on the books forbids insurance coverage for certain acts or omissions in civil rights contexts, insurance companies develop

work-arounds that provide coverage. In doing so, the potential impact of civil rights remedies is diluted.

The evolution of insurance coverage of punitive damages is illustrative. Traditionally, insurers did not provide coverage for punitive damages. Insurance companies exclude coverage for willful or wanton acts because insurers do not want to incentivize poor behavior by insureds. Moreover, insurance coverage for either punitive damages or intentional acts committed by an insured is prohibited by statutes, regulations, or court cases in approximately 25 states (Betterley Report 2012). Courts often hold that insurance coverage for punitive damages is contrary to public policy. Thus, the law on the books in many states prevents employers from shifting risk and responsibility to insurance companies when facing punitive damages. However, through EPLI, the insurance field mediates this potential risk that employers face by providing work-arounds that allow employers coverage even in states that prohibit the insurability of punitive damage awards. Conferences, interviews, and documentary data reveal that the vast majority of EPLI insurers now offer coverage for punitive damages in amounts up to the full limit of liability.

One way that insurers build discretion into legal rules is by including “most favorable venue” language in the EPLI policy. A “most favored venue” endorsement is a choice of law provision that applies the law of some other state to determine the insurability of punitive damages. My review of various EPLI policies reveal that “most favored venue” language takes a few different forms. Under one approach, the policy expressly states that the enforceability of coverage shall be governed by the applicable law that most favors coverage for punitive and exemplary damages. A slightly narrower approach involves insurance companies listing state jurisdictions in their policies that the insurance companies must look toward in determining

insurability. If any of the listed states permit punitive damages to be insured, then the insurer must treat that jurisdiction as the applicable one for purposes of assessing its ability to pay punitive damages. Thus, even though the law on the books often prohibits coverage for punitive damages, the law in action is that these damages are covered by EPLI.

Insurance institutions use conferences, webinars, and loss prevention manuals to advertise, endorse, and ultimately institutionalize a work-around of laws that prohibit coverage for punitive damages. The following highlights how the insurance field, through the trainer administering the webinar, builds discretion and flexibility into legal rules and navigate around laws that prohibit insurance coverage for punitive damages:

Most of the insurance policies provide coverage for punitive damages, but there's a huge caveat. And the caveat would be [whether] the coverage is allowed by law, and there are a number of states that don't allow the insurance of punitive damages. So there's a tweak to the policy, generally referred to as most favorable venue, which you'll find in many of the EPL policies that essentially provides some flexibility in whether the insured can actually collect a punitive damages insurance claim (Web., 710-730).

In addition, many insurers have offshore facilities or enter into relationships with foreign insurance companies to provide "wrap-around" policies that will ultimately pay employers' punitive damages liability. These insurance policies are underwritten and sold completely offshore often in Bermuda or London to employers with offices within the United States. These non-U.S. jurisdictions have a more liberal rule concerning insuring policyholders from the United States against punitive damages. Because these wrap-around policies are sold offshore, they are not subject to state law prohibitions on coverage for punitive damages:

Insurance Risk Management Expert Trainer: A more guaranteed, but more cumbersome and expensive version of [most favored venue] is a separate policy written in a lovely place like Bermuda, where the type of coverage available is not governed by U.S. law or regulation. And that policy would be, essentially a parallel policy and, it is typically only bought by relatively large companies (Web., 715-39).

Bermuda wrap-around policies apply not just to judgments that include punitive damage awards, but settlements as well. Risk management insurance specialists indicate that there is no restriction on an insurer's ability to pay a settlement of a punitive damage claim as opposed to a final and non-appealable punitive damage judgment.

Thus, in this instance, even though civil rights laws often potentially subject employers to punitive damages, and state insurance laws often prohibit the insurability of such damages, EPLI insurers build discretion into their policies and broaden coverage to include punitive damages. Framed as necessary risk management and risk aversion, EPLI weakens the ability of state and federal civil rights laws to hold employers directly responsible for paying such damages since employers now have the ability to transfer these risks to insurers.<sup>8</sup>

*Insurance Companies Recontextualize Legal Rules Around a Non-Legal Risk Logic*

Insurance companies do not just build discretion into legal rules, they recontextualize legal rules around a non-legal risk logic that focuses on averting risk and making discrimination claims against employers more defensible. One example of how the insurance field transforms the meaning of employment law is through its recommendations concerning when to use performance improvement plans (PIPs). PIPs are a progressive discipline policy that was created in the past 45 years as a mechanism for improving employee performance and communicating an employer's expectations to the employee. In particular, PIPs advise an employee that her performance is inadequate, ascertain reasons for why her performance is inadequate, identify what is unacceptable in the employee's performance, specify precisely what the employee is expected to do in the future, and provide a clear warning that a failure to correct performance

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<sup>8</sup> Obviously, employers remain at risk for paying higher premiums and deductibles, but EPLI allows employers to shift a significant portion of the risk.

deficiencies will result in adverse consequences. PIPs help the employee by setting goals while also providing notice that if such goals are not achieved, there could be adverse consequences. In addition to the potential adverse consequences, the results of the performance appraisals may be used as a basis for rewarding, reassigning, and promoting employees. Employers market and celebrate the usefulness of PIPs and other legalized policies and procedures in their training manuals (Sutton et al. 1994). Moreover, federal agencies are required to provide a PIP when the employee's performance is deemed unacceptable (5 C.F.R. § 432.104).<sup>9</sup>

While employers' institutionalized practice is to provide PIPs prior to terminating employees, the insurance field discourages using PIPs against employees that might be terminated. Panelists at EPLI conferences routinely discourage using PIPs, especially if an employee has previously made a complaint to an employer. One panelist indicated: "PIPs are bad for litigation, 80% of people who receive a PIP end up being fired. Jurors view PIPs as a way to set someone up to be fired, especially if the employee raised a complaint or concern earlier." In addition to panelists, loss prevention guidelines suggest that issuing PIPs to an employee that has previously raised a complaint increases litigation risk. Thus, the value of using PIPs as an effective mechanism for improving employee performance is now recontextualized by insurance field actors around managing and averting risk and avoiding a negative inference from a jury at trial. To the extent the insurers' advice is followed, employers and employees may be stripped of a useful and protective tool.

Insurance companies and risk management specialists at conferences focus considerable time on making discrimination claims against employers more defensible. For example, under

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<sup>9</sup> The history of the CFR notes that the purpose of the PIP is to "protect employees from arbitrary labeling of work as 'unacceptable' and ensures that employees are made aware in advance of what is expected of their performance and further intended to give agency considerable flexibility in devising methods for evaluating performance" 5 U.S.C. § 4302.

traditional agency law principles, an employer can be held vicariously liable under Title VII if one of its supervisors engages in discriminatory behavior. Legal decisions and legislation holding employers liable for the actions of supervisors encourages and promotes increased training and monitoring of supervisors. Employers in turn, spend time developing policies and procedures and educating their supervisors on what constitutes permissible conduct. In *Vance v. Ball State University* (2013), however, the United States Supreme Court recently narrowed the scope of who constitutes a supervisor in sexual harassment cases. The Court in *Vance* held that a supervisor is not simply an individual who directs the daily activities of other employees but instead is one who has the ability to take “tangible employment actions against the victim” such as hiring, firing, disciplining, promoting, or reassigning an employee.

Employment practice liability training sessions celebrate the *Vance* decision as a “victory for employers” because it provides employers an easier and clearer standard to apply when determining an employee’s supervisory status in sexual harassment cases (EPL Cf. 1, 100-08). How are employers advised by insurance companies to respond in light of the *Vance* decision? Insurance institutions recontextualize the *Vance* decision in terms of risk shifting and avoiding liability. EPLI risk management consultants and attorneys suggest that employers not have many supervisors, selectively use the term “supervisor,” clearly document and communicate levels of authority, and avoid behavior that gives an inference that the employee is a supervisor. In particular, field actors *dissuade* employers from having lots of employees participate in training programs that could suggest an employee is a supervisor. Finally, employers that follow these suggestions are encouraged to bring more motions for summary judgment since the law has narrowed the definition of supervisor. In this instance, insurance institutions are steering employers toward avoiding liability and defending cases, encouraging narrower employee job

descriptions, and advocating for less comprehensive training to employees who are engaged in possibly supervisory capacities. Unlike in the directors and officer insurance liability context where insurers fail to engage in loss prevention behavior (Baker and Griffith 2010), insurance institutions involved with EPLI do engage in loss prevention advice. However, within the context of risk reduction, EPLI insurers engage in loss prevention in a way that focuses largely on limiting exposure of the employer and potentially weakening the impact of state and federal civil rights laws on workplace environments.

In addition to trying to make claims more defensible, insurance field actors also address the most recent changes in anti-discrimination laws and advise employers how to alleviate risk. For example, conferences and training sessions spend considerable time discussing workplace bullying, a relatively new workplace issue that is now being increasingly litigated by plaintiffs lawyers. Workplace bullying occurs when an employee is subjected to abusive conduct that is so severe that it causes physical or psychological harm. Examples of abusive conduct that constitute workplace bullying include repeated infliction of verbal abuse, intimidating or humiliating conduct against the employee, or gratuitous sabotage or undermining of an employee's work performance. Although approximately 25 states have filed legislation pushing for "healthy workplace laws," workplace bullying is currently not illegal unless carried out against someone in a protected class. EPLI conference panelists, however, indicate that alleged victims of bullying use a variety of existing legal causes of action to pursue these claims, including defamation, intentional infliction of emotional distress, negligent hiring and supervision, and assault and battery. The proposed healthy workplace laws, existing causes of action, and the raised awareness of workplace bullying in public discourse encourage employers to increasingly foster a safe and positive work environment.

Although insurance institutions have an opportunity to encourage more lawful conduct in light of changing anti-discrimination laws, insurance field actors shift responsibility for fostering a safe and positive workplace away from employers by communicating how EPLI provides coverage for employers in the event that an employee is found liable for bullying: “Don’t worry. EPLI has a catch all for these situations. Bullying claims fall within the definition of wrongful act in the policy-it is a wrongful workplace policy or procedure” (EPLI Cf., 11, 360-63). Thus, similar to the directors and officers liability insurance context (Baker and Griffith 2010), insurers have the ability to engage in loss prevention behavior but do not undertake such action. As opposed to highlighting ways to prevent workplace bullying, insurers at conferences and webinars focus on risk aversion and subtly shift risk and responsibility away from employers by emphasizing that EPLI provides insurance defense and indemnification for this particular legal claim (cf. Baker 2002).<sup>10</sup>

*Risk Management Value-Added Services: Mechanisms through which Insurers Seek to Influence the Form of Compliance*

In contrast to the treatment of punitive damages and how to respond to contemporary Supreme Court cases, EPLI insurers also provide risk management or “value-added services” to employers that purchase EPLI that may be compatible with or even induce more compliance. While these services vary, the goal is to help employers become more knowledgeable and proactive about their employment practice risks and to reduce the number of claims and the amount of losses that occur. Insurers, risk management consultants, and brokers market these services as reducing costs and risks while also helping foster a positive culture:

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<sup>10</sup> I do not mean to suggest employers are incentivized to violate civil rights laws. Insurers offering EPLI experience-rate. Thus, the less discrimination claims an employer has the less premiums the employer will be charged. However, my point is that insurers offer employers a safety net and ultimately, employers would rather pay insurers for defense and indemnification of such claims than face paying discrimination claims without insurance.

This is a unique program. It is designed to build companies, and to make a difference in your bottom line. We have the compliance materials just like everyone body else. But, we also have the culture building and growth building materials” (Web., RM Cons., 97-109).

The result of using this program is protections from disloyal employees, greedy lawyers, power hungry bureaucrats and unfortunately your own costly mistakes. The upside is that you’re able to hire, keep, and motivate great employees, have career improvement, a healthier bottom line and the peace of mind that comes with knowing you’ve got your act together (Web, RM Cons, 21-28).

These value-added and loss prevention services allow insurers to not just shift risk off employers, but provide an opportunity for insurers to encourage managerialized responses and a formalization of policies and procedures in workplace settings. Whereas prior new institutional research highlights how managerial values influence the way that organizations understand law and compliance (Edelman, Fuller, and Mara-Drita 2001), risk and managerial values work hand-in-hand in the context of drafting, marketing, and selling EPLI.

### *Legal Hotlines*

One way that insurance institutions influence the form of civil rights compliance is through the EPLI hotline that employers may access when they want answers to legal questions. These toll-free hotlines put employers in direct contact with attorneys and law firms that EPLI insurers have contracted with to provide legal consulting and advice. Thus, these lawyers act as surrogates for the insurance company. Employers may make an unlimited number of calls to the hotline and all calls are confidential. Employers using these hotlines ask questions concerning how employment law affects a potential employment-related action, the development of a policy or procedure, or advice on a strategic personnel practices decision. Questions that arise are almost exclusively legal in nature and handled by a small group of specialty employment law firms. Table 5 highlights how insurers routinely advertise the kinds of legal questions their hotline answers for employers:

**Table 5**  
**Employer Inquiries to Insurer Controlled Legal Hotlines**

<p>“An employee came to me claiming sexual harassment. What should I do?”</p> <p>“We plan to cut several employees’ hours, but plan to maintain their full-time status. Is there any law that prohibits us from doing so?” (E-Risk Services)</p> <p>“What is the Tennessee statute on lunch breaks? Does the statute have a number?” (E-Risk Services)</p> <p>“Does an employee have a right to privacy in email messages that he sends or receives at work? Can we look at those messages?” (Insurance Co. loss prevention materials)</p> <p>“A minority employee maintains that she was overlooked for a promotion because of her ethnicity and her religion. What action should I consider?” (Insurance Co. loss prevention materials)</p> <p>“Are we required to offer training about sexual harassment?” (Insurance Co. loss prevention materials)</p> <p>“Is it necessary to offer FMLA to an employee who is off work because of a workers’ compensation injury?” (E-Risk Services)</p>
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As these examples illustrate, when employers call these hotlines, they gain answers to legal questions from lawyers that EPLI insurers select and pay. EPLI hotlines reduce risk by providing information on how employers can better comply with laws.

Industry experts consider the hotline the most useful value-added service that they offer employers: “The one that’s seen as most valuable is the opportunity to call a lawyer for free” (Web., 900-04). Risk management consultants and attorneys who answer hotline questions repeatedly frame themselves as legal “coaches” whose job is to try to guide employers toward minimizing liability and risk: “the best services are the ones where there’s a personal contact where you’re actually able to not just assess information, but they actually coach you through a problem” (Web., RM Cons., 911-18). Thus, to the extent that the law firms that are sponsored by insurance companies provide accurate advice concerning employment matters to employers, the hotlines provide a pathway for

insurance companies to influence how employers understand their legal obligations. In this respect, EPLI value-added services can potentially increase compliance.

### *Written Training Materials*

In addition to assistance provided by telephone, insurers attempt to construct what compliance with anti-discrimination laws mean through a series of written value-added services. These documents also advise employers on how to prevent and defend employment lawsuits. EPLI insurers offer employers over 200 personnel forms, policies, and checklists, monthly newsletters, compliance quizzes, videos, and legal summaries and updates, including some that address hiring, employee retention, compliance, performance management, and termination decisions. Similar to training conducted by employers (Bison Rapp 1996, 1999), EPLI loss prevention manuals and training sessions specifically coach employers on how to make discrimination claims more defensible: “this guide is intended to help...It includes practical suggestions for limiting employment liability, from initial interview to termination of employment, and it discusses common types of employment claims and what to expect from employment litigation” (Ins. Co., loss prevention guidelines, at 89-91). Building a written file against employees and documenting complaints and problems with employees is reiterated repeatedly at conferences and written materials that are provided to employers. EPLI insurers also often audit an employer’s written policies, procedures, forms, and handbooks to determine whether they comply with federal, state, and local laws. Similar to the hotlines and written materials that are provided to employers, EPLI audits focus on interpreting and implementing employment laws and preventing employment lawsuits.

Insurers offer employers access to the employee handbook and employment “contract builder.” This service allows employers to simply click and drag from an online portal whichever provisions they want included in their employee handbook and employment contract. Employers are able to build a handbook and develop contracts without actually drafting the documents:

[We use a] very robust Microsoft Share Point platform and we have pre-populated that platform with all the strategies and tools that you can see on this front page here that allow you to create other tools like audits, quizzes and surveys... You’re able to customize your page to a certain degree. Your company logo will go in there and you’re able to add some links very easily from the external link button (HR TWD, RM Cons., lines 39-44).

These written value-added services can have a potential positive and negative impact on compliance. On the one hand, offering these services may reflect some best practices, lead to improved employment handbooks and contracts, and may promote a better work culture. On the other hand, these services make it easy for employers to develop policies and procedures without actively drafting them. Also, insurance company guidance on these issues largely focus on how to avoid litigation as opposed to providing steps to build a discrimination-free work environment—the often stated goal of risk management services offered by EPLI insurers.

Thus, with respect to the insurance field’s risk management services, we see how risk and managerial logics complement one another (cf. Edelman, Fuller, and Mara-Drita 2001). The insurance field has itself adopted a managerialized conception of employment law, which highlights the elaboration of employers’ formal structures that demonstrate compliance and rational governance. The insurance industry sells this vision by highlighting the risk of not developing policies and procedures as well as providing a safety net for employers in the form of defense and indemnification insurance coverage.

EPLI risk management services influence the form of compliance by recontextualizing anti-discrimination laws around a non-legal risk logic that focuses on avoiding litigation. In doing so, my study reveals that insurance institutions do not just influence private law as prior research on insurance suggests, but rather, shape the meaning of public legal rights and remedies afforded employees by federal and state laws in subtle but important ways.

### **THEORETICAL, METHODOLOGICAL, & POLICY IMPLICATIONS**

This study elaborates the literature on the relationship between organizations and law by combining new institutional organizational sociology studies of how organizations respond to legal regulation and socio-legal insurance scholars' studies of how institutions govern through risk. In particular, my study bridges these two theoretical frameworks by revealing how insurance institutions rely on risk-based principles and narratives to construct the threat of employment law and influence the form of compliance from employers.

Although prior new institutional studies of law and organizations emphasize the way that managerial values influence what anti-discrimination law means, governing through risk provides an alternative framework by showing how risk values are mobilized by the insurance field when evaluating and interpreting what compliance with anti-discrimination laws mean. Through EPLI and a series of accompanying risk management tools, insurance institutions conceptualize anti-discrimination law in terms of risk and encourage employers to engage in managerialized responses. My study reveals how risk and managerial narratives in this setting are complimentary. Finally, my study enhances prior new institutional research by highlighting the role that insurance and in particular, insurance institutions, play in shaping the nature of civil rights compliance.

While insurance scholars' research on governing through risk informs new institutionalists, the new institutional framework also enhances socio-legal studies of insurance. New institutional understandings of how organizational fields have norms, values, and logics that become institutionalized within a field and alter the meaning of law and compliance informs the governing through risk studies because it helps explain *how* risk-based principles influence the way that the insurance field constructs the nature of civil rights compliance. Uncertain legal risk, risk elevation, and a call for risk reduction through purchasing EPLI insurance all create and perpetuate a legal environment that calls for risk management. My multi-site, multi-method approach shows how risk narratives are institutionalized in the insurance field through not just policy language, but a series of value-added services that insurers offer. My study enhances prior empirical studies of governing through risk by revealing how the insurance field governs through risk and uses considerations of risk and insurance services to influence organizational strategy and decision-making. Prior work in the directors and officers context shows how the insurance industry has the ability to engage in loss prevention behavior but does not try to engage in such behavior (Baker and Griffith 2010). In this instance, the insurance industry does try to engage in loss prevention but does so in a manner that at times is consistent with the civil rights logic of fostering equality, due process and fair governance, but at other times seems focused largely on making discrimination claims simply more defensible.

From a policy standpoint, this study raises important questions about the role of insurance in regulating employer and employee relationships. While prior research highlights how insurance acts as a form of social control on society (Baker and Simon 2002; Baker and Griffith 2010; Ben-Shahar and Logue 2012; Abraham 2013), important questions remain: should insurers regulate employer behavior? If so, how should that authority be exercised? Similar to

human resource officials, in-house counsel, and managers (Edelman, Erlanger and Lande 1993, Edelman, Fuller, and Mara-Drita 2001), my data suggest that the insurance field's involvement as an intermediary may be mixed.

It is important to note that insurers' eagerness to offer EPLI and the accompanying risk management services are not driven by a desire to weaken anti-discrimination law or a lack of concern for employee discrimination and harassment. Insurers believe their policies and their risk management services build a healthy work culture, shift risk away from employers, and prevent lawsuits. EPLI and risk management services such as the audits, hotlines, and online portals of employment handbook materials provide substantive guidance on the law and educate employers on their responsibilities. To the extent that the information provided to employers is accurate in these settings, these services could be compatible with compliance and even induce greater compliance.

However, my fieldwork also suggests at times that there is a disconnect between the moral tones in which legislators, judges, and lawyers discuss anti-discrimination law and the risk tones that insurers use that suggest that litigation is inevitable and needs to be managed rather than a sign of morally wrongful conduct that must be eradicated. Thus, while EPLI may improve compliance, it may potentially undermine formal legal rights in several ways.

First, the punitive and deterrence goals of anti-discrimination laws may remain unfulfilled when employers purchase EPLI. When insurers sell insurance that covers employment discrimination claims and punitive damages, it allows employers to shift risk and responsibility away from themselves. Even though civil rights laws are supposed to increase law abiding behavior, EPLI insurers may dilute Title VII's deterrence capabilities and insulate employers from liability. For example, using punitive damages as a legal weapon that punishes

employers for gross misconduct may be weakened if EPLI insurers are able to provide insurance coverage to employers that are found liable for punitive damages. Risk management programs that advise employers in light of the Supreme Court's decision in *Vance* to narrow the scope of supervisors to avoid liability as opposed to counseling employers on permissible and impermissible modes of supervision may not further the goals of civil rights. Thus, insurer risk management tools may deflect attention from societal and historical practices that disenfranchised particular groups and instead shift focus toward avoiding lawsuits.

Second, overreliance on EPLI risk management systems may allow employers to avoid more active engagement with the design, content, enforcement, and maintenance of its employment policies. By encouraging employers to use insurer-sponsored legal hotlines and contract builder and employment handbook online portals, the insurance field shifts or decouples responsibility for hard normative judgments to others (such as insurance companies) operating outside the organization (cf. Bison-Rapp 1996, 1999; Edelman, Fuller, and Mara-Drita 2001). Insurance industry services that diminish an employer's individual responsibility to design its employment policies and procedures may diminish employer responsibility for making moral, ethical, and legal choices involved with compliance (cf. Baker 2002). To the extent employers can simply download employment contract and handbook documents from insurers offering such risk management services, EPLI enhances the possibility that employers may be lethargic in taking ownership over compliance policies and procedures and consequently, prevent employment laws from positively impacting workplace environments.

Finally, EPLI risk management services do not just reduce risk, they actively construct the meaning of compliance and law. Given that much of employment law is ambiguous, insurance companies are filling in the space and interpreting the meaning of compliance

(Edelman 1990, 1992). The insurance field acts as a legal intermediary between what civil rights laws say in cases and statutes and how civil rights are implemented and enforced by employers (cf. Talesh 2015 forthcoming). While not many people dispute that the civil rights revolution produced significant results, there is sharp disagreement over the extent to which some employees continue to confront discrimination and what if anything, the law can do about it. Laws protecting against discrimination honor the ideal of public justice and nudge organizations toward fidelity to law when dealing with employee complaints. It is entirely natural for employers subject to civil rights laws to seek to demonstrate their compliance and for insurance companies to offer services that spread, shift, and reduce that risk. However, as a policy matter, it is crucial that legislators, regulators, and the citizenry interrogate those forms of compliance and in particular, intermediaries such as insurance companies that attempt to influence the nature of civil rights compliance. Otherwise, these risk management services may merely encourage employers to reduce their exposure and liability rather than prevent discrimination, improve work culture, and cultivate a discrimination-free work environment.

At a minimum, this article highlights the potential for constructive linkages between studies on risk management, managerial rhetoric, and law and organizations. More qualitative, empirical studies of how risk-based logics are mobilized by intermediaries and mediate what law means would help strengthen organizational theory. Clearly, future scholarship should address the relationship between risk-based logics, constructions of law, and organizational practices. Only empirical studies of employers' actual practices implementing policies and procedures can reveal whether EPLI and the accompanying risk-management services lead employers toward greater compliance or whether employers are simply making discrimination claims more legally defensible. Given the likely variation in the extent to which organizational risk management and

compliance programs embrace or neglect civil rights laws, future studies should seek to disentangle this puzzle and further elucidate what workplace equality means in action.

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### **Statutes**

5 U.S.C. § 4302.

### **Regulation**

5 C.F.R. § 432.104.