

Choosing the Right Liability Insurance

Q I have been named executive director of a newly-formed nonprofit association. I recognize it is important to purchase liability insurance on the association's behalf. What do I need to know to start?

A Even with the assistance of a broker, the process of selecting the right coverage can be daunting. To manage the process, think about it in three steps: First, learn about the various categories of coverage and the differences among them; Second, based on the association's activities, determine what policy or policies are needed; Third, compare available policies and select those that provide the best coverage for your organization.

New associations, as well as established organizations reviewing their existing coverage, should assess their needs with respect to the following categories of liability:

- **Directors' & Officers' (D&O) Liability.** Historically, "directors' and officers' liability" policies covered claims arising from management decisions made by an association's board of directors. Today, most D&O-type policies are written to cover the association's non-director officers, committee members, and other volunteers as well as its board members. Related "association professional liability policies" provide coverage for claims made against the association itself, its officers, directors, and other volunteers. D&O coverage should be a high priority for an association,

not only because of the coverage it provides, but also because potential board members may not be willing to serve if it is not in place.

- **Employment Practices Liability (EPL).** EPL policies cover claims involving wrongful acts by an employer, such as employment discrimination, sexual harassment, violations of the Americans with Disabilities Act, or wrongful termination. Some insurers offer EPL coverage in a stand-alone policy, while others couple it with D&O insurance. Associations with even one employee should consider obtaining coverage.
- **Commercial General Liability (CGL).** CGL policies cover a wide spectrum of claims alleging that association employees or contractors acted negligently, and that the negligence caused injury resulting in one or more of the following: (i) bodily injury or property damage; (ii) medical payments; or (iii) personal or advertising injury. CGL policies typically have separate insuring agreements, with separate premiums and terms for each category of coverage. Associations conducting educational programs, fundraising, or other events often purchase a CGL policy.
- **Umbrella/Excess Liability.** Umbrella and excess liability policies provide coverage above the limits of underlying coverage. Some umbrella policies also cover claims not covered by the underlying policy. Individual insurers, however, may define the terms differently; thus, it is important to read the policy to determine the actual scope of coverage.

In addition, associations may opt for specialty coverage for automobile liability, cyber liability, or professional liability (sometimes referred to as "errors and omissions" or "E&O"), and they may be required by state law to obtain workers' compensation coverage. It is important to note that insurers often group different types of coverage together and then market a single policy under a unique name as a means of distinguishing themselves from their competitors. As a result, it is important to focus on the coverage being offered, not on the name assigned to the policy.

Once an association determines the type(s) of coverage it needs, it should seek assistance from advisors, including brokers and attorneys, in evaluating options and choosing one or more policies. Although each policy should be reviewed in its entirety, it is important to pay particular attention to the following:

- **Definitions:** What is a "wrongful act?" Who is a "covered individual?" Does the policy cover "all volunteers" or only "officers, directors, and committee members?" What is the "policy period?" The manner in which terms are defined significantly affects the scope of coverage. Read and understand those definitions before selecting a policy.
- **Deductible:** Sometimes referred to as the "self-insured retention amount," a deductible represents the amount the association must contribute before the insurer pays a claim. Higher deductibles tend to keep premium costs down, but the asso-

ciation must be prepared to cover the deductible in the event of liability.

- **Defense Costs:** Where the insurer has a "duty to defend" an association from claims, it must provide a full defense even if a portion of the claim is not covered. If no "duty to defend" exists, the association has greater control of the defense, but the insurer may allocate defense costs between covered and uncovered matters. Check not only whether the insurer has a "duty to defend," but also whether defense costs are inside or outside the limits of liability. If defense costs are outside the limits, they will not erode the association's liability limit.
- **Exclusions:** It is critical to determine not only how the insurer describes what is covered under the policy, but also what is excluded from coverage. Exclusions can significantly limit a seemingly broad-based policy. If only one or two exclusions raise concern, ask the broker if they can be added back through an endorsement (for a reasonable increase in premium).

Dense insuring agreements replete with terms difficult to decipher can make policy selection seem difficult; however, as long as you understand the categories of coverage, identify your association's specific needs, and seek assistance from brokers and attorneys regarding policy options, selecting the policy or policies for your association should be a manageable responsibility. ■

This Law Review was written by Susan Feingold Carlson and edited by Jed Mandel, both of whom are founding members of Chicago Law Partners, LLC. CLP serves as the Association Forum's general counsel.

