Insurance Gaps and Trends

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April 24th, 2015

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Volunteers and the Nonprofit Commercial General Liability (CGL) Insurance Policy

Bob Baker

Who is an insured; the Named Insured:

- The Entity
- Employees
- The Board of Directors
- Volunteers

Insured for What:

- Third Party damage, civil law, property damage and bodily injuries triggered by negligence of the Named Insured
- Bodily Injury/Property Damage
- Personal Injury

Volunteers and the Nonprofit Commercial General Liability (CGL) Insurance Policy

Bob Baker ***(continued)***

Volunteers as Insureds:

- Volunteers as First Party Insureds and Third Party claimants
- The Employee/Employer's CGL exclusion – Volunteers are not excluded
- GAP: Volunteer vs. Volunteer CGL exclusion
- Third Party No-Fault Medical Payments afforded volunteers

Insurance Options for Volunteers

- Volunteer Accident Medical Insurance
- Workers' Compensation for Volunteers in some States, such as WA
- Liability coverage afforded by the Volunteer's Homeowner's Policy
- A specified Excess Master Volunteer Liability policy; Lloyds of London via CIMA, $2 per Volunteer subject to a low minimum premium, $1,000,000 per occurrence/$3,000,0000 master annual aggregate

Employees Using Their Own Personal Vehicles for the Nonprofit and the Nonprofit Commercial Non-owned Auto Policy

Bob Baker

Who is an insured by the nonprofit's Non-owned Auto Liability coverage:

- You, the nonprofit entity, not the employee
- Civil law can hold an employer, the nonprofit, liable for the negligent actions of employees (and volunteers, and third party contractors) using their personal vehicles on company time/operations

Owned Auto Insurance follows the title holder of the vehicle:

- An auto policy is written for the vehicle owner
- That auto policy pays for the negligence of the owner and allowable drivers
- Allowable drivers would personally have defense and coverage under the title holder's policy as would the title holder
- If an allowable driver uses a car that has no insurance their personal auto policy would step in to fill the gap
- If they have no personal auto policy but reply on a commercial auto policy a "drive other car endorsement" should be added to the commercial auto policy
- If allowable driver has no auto insurance and they drive a car with no insurance there is "no" insurance

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Employees Using Their Own Personal Vehicles for the Nonprofit and the Nonprofit Commercial Non-owned Auto Policy

Bob Baker *(continued)*

Does the nonprofit want to protect and provide excess liability auto insurance via their Non-Owned Auto policy for employees using their personal vehicles on company business?:

- A specific "Employee as An Insured" auto endorsement must be added to the Non-owned auto policy
- Once added this provides the employee excess auto liability coverage via the company's non-owned insurance policy when using their car on company business. This gives them an additional $1,000,000 auto liability protection if they don't currently purchase a personal $1,000,000 umbrella.

The following is added to the Section II – Covered Auto's Liability Coverage, Paragraph A.1. Who is An Insured provision: Any "employee" of yours is an "Insured" while using a covered "auto" you don't own, hire, or borrow in your business or your personal affairs.

Insured vs. Insured Exclusion in the Nonprofit D&O policy

Bob Baker

D&O policy forms are not ISO (Insurance Services Organization), therefore each insurer has their own policy language and coverage terms. The items listed in this section are not specific to one insurer and are not comprehensive, they are a general representation for the purposes of this discussion.

A. Who is an Insured: Past and Present

- Directors
- Trustees
- Officers
- Employees
- Committee Members
- **The Organization Itself**

Insured vs. Insured Exclusion in the Nonprofit D&O policy

Bob Baker ***(continued)***

B. Insured for What

- Wrongful Acts (a few examples)
  - Act
  - Error
  - Omission
  - Neglect
  - Breach of Duty

C. Loss means the amount that any insured becomes legally obligated to pay on account of any covered claim

- Damages
- Judgments
- Settlements
- Punitive Damages
- Does not include taxes, fines, or penalties

Insured vs. Insured Exclusion in the Nonprofit D&O policy

Bob Baker ***(continued)***

D. What represents a Claim

- A <u>written</u> demand for monetary and non-monetary relief
- A civil proceeding
- A criminal proceeding
- A formal administrative proceeding
- Any arbitration

E. Gap: Insured vs. Insured Exclusions (five leading nonprofit D&O insurers were reviewed)

- The exclusion wording and intent varies by insurer
- Three exclude suits or demands brought by one insured person against another; two do not as long as the demand or action is not on behalf of the Organization
- All exclude claims brought on behalf of, or by the Organization, or for the benefit of the Organization, but two allow this if:
- A derivative action on behalf of the Organization is made without the participation or intervention of an "Insured", or brought by one or more security holders of the Organization who are not Insured Persons

Insured vs. Insured Exclusion in the Nonprofit D&O policy

Bob Baker ***(continued)***

F. Solutions/Thoughts

- Be aware of the variables between policy forms
- Your broker should be able to direct you and show you options and comparatives
- The intent of the Insured vs. Insured exclusion is not to insure in-fighting within an Organization on behalf of the Organization
- Consider the ramification of insurance policy exclusions the Bylaws of the Corporation indemnifies Board Members
- If there’s no insurance in place, or available, for an action brought against a Board Member or Director, the corporation could pay out of pocket for their defense costs and settlements
- Other Methods of risk management instead of the insurance risk transfer
  - Board orientation and training
  - Understanding the role of the board
  - Regular board meetings
  - Informed boards
  - Full disclosure of information
  - Considered action
  - Thoughts?

Self Funded Unemployment Insurance

Diane Durnin

Problem

Nonprofit employers paying the State Unemployment Tax (SUTA) often overpay their state unemployment agencies for this mandatory insurance cost. These tax funds go to the state's unemployment compensation pool to pay benefits on all statewide employees. Any balance remaining in an employer's SUTA account is ***non-refundable*** and owned by the state.

Solution

The federal government has given nonprofits an alternative to paying the high cost of SUTA – reimbursement financing. This option allows your nonprofit to pay dollar-for-dollar for only the unemployment claims issued to your former employees and redirect those tax dollars saved back into your mission.

Option One: Insurance

Diane Durnin

The Bonded Service Program

Your annual fee is based exclusively on your own unemployment experience and employment profile. There is no shared risk or shared expenses.

The Bonded Services Program assumes all unemployment claim liability.

This policy reimburses the state directly for any and all unemployment benefits paid to your former employees attributable to the coverage term.

The Bonded Service Program provides, at no additional cost to you, professional unemployment claims administration and cost control.

You receive services from unemployment insurance professionals familiar with your state's laws and statutory requirements. Claims validation, representation at all unemployment appeal hearings, audit of benefit charges, and when you need advice, consultation regarding the proper handling and documents of these important and inclusive services.

Option Two: Reimbursement

Diane Durnin

The Unemployment Savings Program

The unemployment savings program provides a fixed annual budget into your nonprofit's very own interest-bearing, proprietary reserve account all while allowing you to save thousands of dollars when compared to paying the state unemployment tax (SUTA). *Your annual fee is based exclusively on your own unemployment experience and employment profile. There is no shared risk or shared expenses.*

Build a reserve account your nonprofit actually owns.

Unlike taxes paid into your account with the state, this interest-bearing reserve account is yours and is returned to you if you should ever decide to withdraw from the program. The balance in your account can be carried in your books as it is considered an asset to your organization.

Improve your cash flow by making equal, fixed quarterly payments to your reserve account.

Most of your payments into the tax system are made during the first and second quarters. Program members make four equal installments over the course of the year.

Professional unemployment claims administration and cost control included. You will receive services from unemployment insurance professionals familiar with your state's laws and statutory requirements: Claims validation, representation at all unemployment appeal hearings, audit of benefit charges and advice; including trainings and seminars on the unemployment processes.

Excess Coverage

Diane Durnin

Protect your organization against high unemployment years with stop loss insurance to cap your financial liability.

Excessively high claims do happen. Perhaps you lose a grant and need to lay off several people? Our excess loss insurance policies limit your liability when unexpected events such as this happen. The attachment point, point at which this stop loss insurance coverage applies, is based on your organization's individual profile. The diagram to the right illustrates the coverage of one of our members:

The Excess Loss Insurance limits are calculated for each member based on their size and experience.

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Regulatory Audit Defense Coverage

Diane Durnin

The Unemployment Savings Program

With a near doubling of whistleblower lawsuits filed in the past five years and continued significant audit recoveries by the government, healthcare organizations should be prepared to face increasing scrutiny in 2014. The government recovered a total of $4.3 billion in audit recoveries in fiscal 2013, according to a recent announcement by the U.S Department of Justice. Whistleblowers received $324.2 million from those recoveries.

Regulatory Audit Defense coverage protects organizations from regulatory audit claims including whistleblower claims. Prior Acts coverage can typically be included.

The Policy includes reimbursement for the defense, fines, and penalties for billing errors, HIPAA, EMTALA, and STARK proceeding by:

- Medicare and Medicaid Audits
- Commercial Payor Audits and Allegations of Billing Fraud
- STARK (Patient Referral) Violations
- HIPAA (Patient Privacy) and Data Breach Allegations/Cyber incidents
- EMTALA (Emergency Medical Treatment Active Labor Act) Complaints
- Coverage for Governmental fines and penalties

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Regulatory Audit Defense Coverage

Diane Durnin *(continued)*

Governmental Agencies Definition – Includes:

- Office of Inspector General
- Department of Justice
- ZPIC Zone Program Integrity Contractor (Centers for Medicare and Medicaid Services)
- RAC Recovery Audit Contractors (CMS, Medicare Program)
- Qui Tam Plaintiff – type of civil lawsuit whistleblowers bring under the False Claims Act, a law that rewards whistleblowers in their qui tam cases recover funds for the government
- Contractors working on behalf of the government

Coverage Nonprofits Should Consider

Chris Page

Business Income

- We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your “operations” during the “period of restoration”
- The loss or damage must be caused by or result from a Covered Cause of Loss
- We will only pay for loss of Business Income that you sustain during the “period of restoration” and that occurs within 12 consecutive months
- Business Income Means: Net Income (Net Profit or Loss before Income taxes) that would have been earned or incurred if no physical loss or damage had occurred and *continuing normal operating expenses incurred, including payroll*
- Options:
  - Extended Business Income
  - Extra Expense

Coverage Nonprofits Should Consider

Chris Page *(continued)*

Business Income – Tax Credit Loss

- Adds as part of the Business Income:
  - The amount of the tax credit loss you incur due to a total or partial delay in your ability to recognize all remaining years of the 10-year Low-Income Housing Tax Credit
  - The amount of the tax credit you lose due to recapture for any building covered under this policy that is in accordance with Section 50(a) of the Internal Revenue Code, the Historical Tax Credit
- Does Not Include:
  - Section 42 Compliance issues not caused by covered loss

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Coverage Nonprofits Should Consider

Chris Page ***(continued)***

Earthquake

Typical Perils Insured Definition

- **Earthquake:** physical damage caused by Earth Movement only
- **Earthquake Shock:** meaning physical damage caused by Earth Movement including Landslide, Mudflow, Earth Sinking, Earth Rising or Shifting, only as a direct and immediate result of Earthquake and not any consequential loss or damage
- **Volcanic Eruption:** meaning the eruption, explosion, or effusion of a volcano

Deductibles:
Each loss or series of losses arising out of one event shall be adjusted separately and from the amount of each such adjusted loss, the sum stated in the Declaration Page shall be deducted. Based on “Values at Risk”

Coverage Nonprofits Should Consider

Chris Page ***(continued)***

Earthquake *(continued)*

Property Excluded:
Exterior masonry veneer (except stucco) on wood frame walls caused by or resulting from Earthquake of Volcanic Eruption

Coverage Available For:

- Buildings
- Debris Removal
- Business Income
- Building Ordinance

Coverage Nonprofits Should Consider

Chris Page ***(continued)***

Ordinance or Law

Coverage for increased costs to repair or replace damaged property due to the application of ordinances or laws that regulate construction, repair, or demotion. Improves the standard “like kind and quality definition”

Loss To The Undamaged Portion of the Building

Coverage for the loss in value of the undamaged portion of the building as a consequence of enforcement of an ordinance or law that requires demolition of undamaged parts of the same building.

Demolition Cost Coverage

Pays the cost to demolish and clear the site of undamaged arts of the same building, as a consequence of enforcement of an ordinance or law that requires demolition of such undamaged property

Coverage Nonprofits Should Consider

Chris Page *(continued)*

Ordinance or Law *(continued)*

Increased Cost of Construction Coverage. Pays the increased cost:

- Repair or reconstruct damaged portions of that building; and/or
- Reconstruct or remodel undamaged portions of that building, whether or not demolition is required; when the increased cost is a consequence of enforcement of the minimum requirements of the ordinance or law

All coverage based on covered cause of loss; building is repaired or replaced

- The result of a covered cause of loss
- The building is repaired or replaced

Industry Trends
Chris Page

Trends in Property Deductibles

- Going Up
- Higher for Certain Perils:
  - Water
  - Vandalism by Tenant
  - Back Up Sewers and Drains (sometimes excluded)
- Applying by Building or by Unit
- The “Wear and Tear” Exclusion Being Used
- For the Future:
  - Carriers only want to pay for “sudden and accidental”
  - Insurance not to be used as a maintenance policy
  - Claim patterns will be use in pricing/coverage/deductibles
- Carriers want “Skin in the Game”

Industry Trends
Chris Page *(continued)*

Premium Credits

- Specifically Scheduled
  - Non-Smoking
  - Stove Top Suppression
  - Renters Insurance
  - Sprinklers
  - Hardwire Smoke
  - Loss Free
- Discretionary
  - Condition of Property
  - Loss Experience
  - Age of Building
  - Building Updates
  - Building Dispersion

Questions?

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