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Side A D&O Is Increasingly Important

If your business is among the majority of entities whose directors and officers insurance coverage includes all three "sides" (A, B and C), consider the possibility that you may need higher limits for Side A.

Side A (aka "insuring Clause 1") provides direct liability protection for individual directors and officers for claims other than those indemnified by the corporation. While Side B is intended to enable the corporation to meet such indemnity obligations, that may prove insufficient in one of three situations:

1. Side B limits prove too low to meet the costs of defense, settlements and judgments.
2. Applicable state statute does not permit indemnification, for example, of damages arising from shareholder derivative lawsuits.
3. The corporation becomes financially unable to fulfill the pledge to indemnify.

It is the third point that may be of most concern to some firms struggling under recent economic downturns. Indemnification plans made confidently under better economic conditions may now be out of reach, leaving directors and officers unprotected.

For corporations in financial straits, it may seem counterintuitive to increase insurance premiums. But the cost for additional Side A coverage to fulfill an indemnification commitment to the firm's officers and directors will certainly be less costly than either paying the full indemnification from corporation coffers or leaving valued advisors and leaders in the lurch.

What's Past Isn't Always Past

If you are taking on a new partner or merging with others, you must consider liability insurance coverage for their prior acts.

For example, imagine you are a dentist and you decide to merge with another practitioner. The new partner brings to the table years of experience and a thriving client base. Business is booming.

Months later, however, one of the other dentist's patients files a claim against him, citing an oral surgery he performed incorrectly 18 months before. Because his firm and yours have since merged, the other dentist is asking you what insurance may be available for this claim.

This illustrates a common problem in business. When old businesses change their legal status or merge with new businesses, liability coverage concerns arising from the process can easily be overlooked. It is important for you to review your professional liability insurance for information on how it may or may not apply to past and newly formed organizations.

Foreign Corrupt Practices Enforcement

Although it may be the major players who make the news, don't think they are the only businesses facing increased enforcement of the Foreign Corrupt Practices Act (FCPA). After 2011's record year for violation settlements, the Securities and Exchange Commission and the Department of Justice are taking a more aggressive approach to discovering and curtailing potential bribes or other illicit payments to foreign companies or officials.

Might your business be subject to such investigation or a fine for an FCPA violation? According to experts, the investigation costs can run into the millions of dollars, and the fines can be significant. One potential protection from the investigative and legal costs of an FCPA investigation or legal action can be your D&O insurance. Coverage may be available to cover the need for defense costs by directors and officers accused of alleged violations, as well as fines assessed for non-willful violations. If the FCPA could apply to your business practices, talk with our professionals today.

Employees' Criminal Histories

The U.S. Equal Employment Opportunity Commission (EEOC) recently issued an updated Enforcement Guidance on employer use of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964, as amended (Title VII).

Among other topics, the guidance discusses:

- How an employer's use of an individual's criminal history in making employment decisions could violate the prohibition against employment discrimination under Title VII
- Federal court decisions analyzing Title VII as applied to criminal record exclusions
- The differences between the treatment of arrest records and conviction records
- The applicability of disparate treatment and disparate impact analysis under Title VII
- Compliance with other federal laws and/or regulations that restrict and/or prohibit the employment of individuals with certain criminal records
- Best practices for employers.

Always be familiar with employment discrimination laws to protect your firm against employment practices liability claims. To review the EEOC's latest guidance and rules, go to www.EEOC.gov.

ADA Discrimination Claims

Employment practices liability insurance can protect employers from claims that allege violations of the Americans with Disabilities Act (ADA).

Many employers underestimate the range of disabilities to which the law applies or how easy it is for an individual seeking protection under the ADA to establish that they have a disability within the definitions of the act.

For example, the ADA's basic definition of "disability" is an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. "Major life activities" include not only everyday actions (such as walking, reading, bending, and communicating), but also major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions").

For more information on obtaining an employment practices liability policy that will help protect your firm's bottom line from claims under the ADA, call our service team today.

Social Media and Employment Practices

Recent reviews of employer social media policies conducted by the National Labor Relations Board (NLRB) general counsel have produced guidelines on what determines a valid and fair approach to employees and their use of social media.

For example, the general counsel found most rules and procedures to be "ambiguous." He noted that "rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful...For instance, the Employer's rule prohibits 'inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct.' We found this rule lawful since it prohibits plainly egregious conduct, such as discrimination and threats of violence…"

The general counsel also reviewed confidentiality provisions. "We also found that the Employer's rule requiring employees to maintain the confidentiality of the Employer's trade secrets and private and confidential information is not unlawful. Employees have no protected right to disclose trade secrets. Moreover, the Employer's rule provides sufficient examples of prohibited disclosures (i.e., information regarding the development of systems, processes, products, know-how, technology, internal reports, procedures, or other internal business-related communications) for employees to understand that it does not reach protected communications about working conditions."

As social media continues to evolve, astute professionals will continue to evolve their workplace policies and procedures regarding proper employee participation. For those times when even the best intentions run afoul of the law or incur litigation, be certain your liability insurance has kept apace for your continued protection.

Don't Retaliate Against Employees

Perhaps you are tired of the constant complaints of an employee. Perhaps you truly believe a complaint of discrimination has no merit. You may have even won a lawsuit filed by a now former employee who complained of harassment.

What you should do is take a deep breath and be certain you are taking all necessary measures to assure unfair discrimination practices are eliminated, prohibited and properly dealt with if they do occur.

What you should not do: retaliate. According to the 2006 Supreme Court case of Burlington Northern v. White, a company's actions can be considered retaliatory if they have the effect of deterring a reasonable employee in the same situation from making a complaint. That is a potentially broad standard, and statistics show the plaintiff's bar has seized the opportunity.

The year 2010 set a record for retaliation claims filed with the EEOC. Retaliation claims now represent over 30% of all discrimination claims filed with the EEOC. In 2010, insurance carriers reported handling 36,250 retaliation claims, with average defense costs per claim exceeding $150,000.

To avoid being buried in this growing avalanche of litigation, risk management is crucial. You need to implement and enforce anti-harassment, anti-discrimination and non-retaliation policies. Augment and support the policies with effective training, and undergird your efforts with employment practices liability insurance coverage. Our professionals stand ready to assist with knowledge, training and coverage resources.

Thank you for your referral.

If you're pleased with us, spread the word! We'll be happy tp give the same great service to all of your friends and business associates

D&O Insurance for M&A

Merger and acquisition activity rose 14% in 2011 and continues the upward trend in 2012. The overwhelming majority, 90%, of acquisition target companies have been sued by shareholders, meaning directors and officers of companies involved in a merger or acquisition need to be on alert. They also need D&O insurance protection.

If your company is one of the 64% of recent survey respondents that expect to be involved in a merger or acquisition in the future, include the risk of a shareholder lawsuit as part of your planning. In addition, talk with us about whether your current D&O insurance provides an adequate safety net for your M&A risks.