

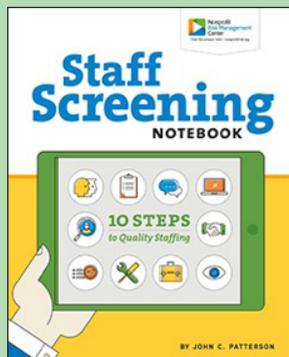
Risk Management ESSENTIALS

Tips, Knowledge and Tools
for Nonprofit Organizations

New Risk Resources!



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Insurance Fundamentals Issue

What Do You Know About D&O?

This issue of *Risk Management Essentials* is devoted to exploring nonprofit insurance policies and coverages. While there are many different policy types and forms with which risk leaders should be aware, one of the most talked-about and valued policies for nonprofits continues to be directors' and officers' liability insurance, commonly known as D&O.

Question #1: What are some of the biggest misconceptions about D&O?

Nonprofit leaders have significant responsibilities to the mission and stakeholders of the organization they serve. Since D&O insurance refers to directors and officers of the organization in its title, many people are confused about how far the coverage extends and assume that the coverage

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is limited to only those individuals. However, the vast majority of D&O policies purchased by nonprofits cover claims arising out of management decisions of the board members, officers, employees, and the organization itself. As noted by Peter Andrew, President and CEO of Council Services Plus, Inc., it is also important to understand that the coverage is limited to *management decisions*, and not all decisions made by an organization's board.

Another common misconception is that the absence of "shareholders" substantially reduces the risk faced by nonprofits and therefore reduces the need for D&O coverage. However, lawsuits can still be brought by vendors, service providers, competitors, regulators, governmental litigators (state attorneys general), donors and beneficiaries of services. Yet the most likely claimant in a lawsuit covered by a nonprofit D&O policy is an aggrieved employee or former employee. And in practice, nonprofit D&O insurance is very often bundled with Employment Practices Liability (EPL) coverage, a type of policy that provides coverage for claims alleging wrongful employment actions. Experts suggest that the vast majority—perhaps 80 to 90 percent—of claims covered under D&O policies actually arise under the EPL portion of the coverage. Thus, obtaining coverage for employment-related claims is often a primary concern for many organizations purchasing D&O policies.

Question #2: What are the most common mistakes made in purchasing D&O insurance?

The board of a nonprofit comes into being when the organization is first incorporated. Thus, for many

organizations, the first risk considered by the organization is the risk that the board members will be held personally liable for decisions they make on behalf of the nonprofit. This early taste of potential risk and liability may create a sense of urgency on the part of the board. A common mistake brought on by that urgency is the purchase of a policy based solely on consideration of the price. The coverage provided by D&O policies and their pricing vary substantially from insurer to insurer.

Choosing a policy based solely on the price can turn out to be a costly mistake when an expensive claim arises and coverage and claims handling are subpar. Remember that purchasing D&O insurance isn't just about the peace of mind associated with *having* the policy; it's really about the protection offered by the policy when a claim arises.

A second mistake stemming from the urgency associated with the newly formed board is the idea that D&O insurance will protect the board and cover potential liabilities wherever they arise. This thought can lead to confusion between the coverage offered by D&O insurance, and the coverage offered by General Liability (GL) insurance. Some nonprofits, particularly those that are newly incorporated with small budgets, may be surprised and dismayed to realize that the D&O coverage they purchased in their organization's first week doesn't extend to third party claims alleging bodily injury or property damage related to a fundraising activity or programmatic offering. For these exposures, General Liability insurance is required.

Another mistake that arises specifically when organizations change carriers—often to take advantage of better pricing—is not ensuring coverage

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“...make certain that you have reported all claims and potential claims to your current carrier before your coverage with that company expires.”

continuity between the policies. Most D&O policies are written on a claims-made basis, meaning that coverage only extends to those claims that are initiated during the term of the policy. If you change from a claims-made D&O policy to another, there is potential for a gap in coverage. Your prior insurer would not cover a claim reported after the expiration date of the policy, and your new carrier might only cover claims where the “event” giving rise to the claim—such as the termination of an employee—occurred during the new policy period. Assuming you changed carriers on January 1st, a lawsuit filed by an employee in January for a wrongful termination that occurred in December might not be covered by either policy.

There are two options for eliminating this potentially serious coverage gap. The first, and most cost effective option is to make sure the new policy either has no prior acts exclusion (a common

exclusion on claims-made policies) or has a “retroactive date” that confers coverage for events that took place prior to the new policy’s effective date. If these provisions aren’t available, a second option is to purchase an extended reporting period (ERP) from the old carrier. The ERP gives additional time to report a claim after the policy has expired.

Another important issue when changing insurers is to make certain that you have reported all claims and potential claims to your current carrier before your coverage with that company expires.

Question #3: What key questions should you ask to determine whether D&O is necessary for your organization?

D&O insurance provides coverage for claims by individuals and organizations alleging financial loss or seeking

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Some common exclusions under policies that frequently surprise nonprofit purchasers include claims alleging violation of the Fair Labor Standards Act (FLSA) and breach of contract claims.

injunctive relief due to management decisions by the nonprofit organization and its paid or volunteer leaders. As discussed previously, the vast majority of claims covered by nonprofit D&O policies allege wrongful employment decisions, such as wrongful termination, employment discrimination, sexual harassment or illegal retaliation. Thus, the first question you should ask is whether your organization employs any paid staff. The hiring of a single staff member opens the door to employment-related claims. And although volunteers generally do not have standing to sue for wrongful termination or employment discrimination, the Center is aware of several instances when a D&O policy was helpful in defending a discrimination claim brought by a volunteer.

A second question to ask is whether your organization's budget allows for the purchase of D&O insurance. In cases where an organization's budget is inadequate to support the purchase of several policies, D&O may be a secondary priority after the purchase of General Liability. However, if your organization relies on staff and interacts with people on a regular basis, the purchase of a D&O policy should be an equally important priority.

Question #4: What are the most common reasons for the denial of a D&O claim?

Several of the Center's go-to experts on the topic of D&O insurance, including David Szerlip, a nonprofit insurance specialist broker with Arthur J. Gallagher, provided similar insights about the common reasons for a claim denial.

A frequent reason that a claim is denied is because it simply isn't reported in a timely manner. Most

policies require that claims must be reported "as soon as practicable," and in any event, within 30 to 60 days after the policy expires. Key personnel in your organization should be aware of the specific reporting requirements, and have a process for ensuring that these requirements are met. Claims are typically defined as "any written demand for monetary or non-monetary relief," a definition that is quite broad. However, sometimes a claim isn't reported by the staff member who receives it because that person believes that the claim will negatively affect the nonprofit's reputation, the insurer will increase renewal premiums, or the claim is simply so far-fetched or ridiculous that it will never lead to a lawsuit. These reasons should not guide the determination about whether or not to report to your insurer. Err on the side of caution and report everything that falls within the definition of "claim" in your policy.

The second common reason for denial of a D&O claim is that the claim is excluded specifically within the policy. Because policies vary substantially between insurers, you should make sure to carefully read and understand all the particular coverages and exclusions in your policy. Some common exclusions under policies that frequently surprise nonprofit purchasers include claims alleging violation of the Fair Labor Standards Act (FLSA) and breach of contract claims. Although some policies may provide limited coverage for FLSA wage and hour claims, most insurers exclude these claims. Breach of contract claims were at one time uninsurable. In recent times, some insurers provide very limited coverage—typically for defense costs—associated with contract breach, but most insurers still don't provide any coverage.

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What Do You Know About D&O?
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Question #5: What are some of the biggest differences in D&O policies written by different insurers?

As mentioned previously, each insurer creates their own D&O policy. Thus, the policies contain subtle as well as substantive variations, and also offer different approaches to claims handling. The following are several common differences:

1. Insurance reimbursement versus “pay on behalf of”

For nonprofits with limited resources, this can be an especially important factor to consider. If the insurance policy indicates that the insurer will “pay on behalf of” your nonprofit, you won’t be responsible for the up-front costs associated with a claim. On the other hand, if your policy indicates that the insurer will provide reimbursement, the cost of defending a claim must be paid by the nonprofit initially.

2. Duty to defend versus no duty

If a policy indicates that the insurer has the duty to defend your organization from claims, this means that the insurer is obligated to assume control of the claim defense process, including selecting counsel and paying legal bills. The insurer must provide full defense even if a portion of the claim is not covered. The downside is that the insured usually has no control in choosing the defense counsel being assigned. If no duty exists, your organization will have more control of the claim including choosing counsel, but the insurer will allocate defense costs between covered and uncovered matters. Under some policies the insured will also be obligated to advance defense costs.

3. Deductibles

The lack of uniformity in D&O insurance policies extends to the

amount you will be required to pay as a deductible. Comparing deductibles along with several other factors will help your nonprofit choose the most appropriate policy. As is true with any policy you purchase for your nonprofit, never elect a deductible that is beyond the financial means of the organization.

4. Special situations

Remember that some policies may provide limited coverage for wage and hour claims and for breach of contract claims. Another major difference between policies is whether coverage extends to third-party sexual harassment claims. In these cases, a non-employee, such as a client, vendor, or business partner alleges sexual harassment (not sexual abuse or molestation) by a staff member or volunteer. Some policies will provide defense coverage for these claims, while others limit coverage to first-party sexual harassment, where an employee alleges harassment by a co-worker or supervisor.

5. Settlement terms

Some policies specifically address whether the insured nonprofit can refuse to settle a lawsuit when an insurer would like to settle. In some cases, the insurer provides a benefit for organizations that agree to settle, such as a discount on the claim deductible. In other cases, a refusal to settle may limit the amount the insurer will pay if liability is imposed by a court in an amount greater than the insurer’s proposed settlement.

While differences abound in the substantive terms of D&O policies, one of the other biggest differences in the value of a policy is the claims-handling approach and expertise of the carrier issuing the policy. When comparing policies from two carriers, always ask your agent or broker about their experience with the claims-handling teams from each carrier. ■



How to Read an Insurance Policy

By *Emily Stumhofer*

Reading a commercial insurance policy is not an intuitive practice and most people find insurance policies difficult to comprehend. Unlike a good book, it is not a document you can curl up with and casually read from beginning to end. Policies are known for being confusing and complicated, and sections frequently cross-reference other sections of the policy, often in a convoluted way. Ironically, insurance companies strive to make their policies as clear as possible, because when coverage is subject to a legal challenge, ambiguity in the language will always be interpreted in a way that favors the insured, not the insurer.

Why Me?

There are several reasons that it is important for you to read and understand your nonprofit's insurance policies. First, each insurance policy is a contract between your nonprofit

and the insurance company. Second, you want to ensure that the policy is covering what you need and expect it to cover, including specific activities and operations, as well as key personnel associated with the organization. Third, if there are special reporting provisions or requirements that apply after your nonprofit faces a loss, you want to make sure that you are aware of what needs to be done, and when it must be done. Claims are paid and defended in strict compliance with your written insurance policies. Don't be naïve in believing that a carrier will make an exception if you fail to live up to a policy's strict claims reporting requirements.

So I Have Insurance, Now What?

This article offers five steps to untangle the complex web that is your insurance policy. Many policies are based on *standardized forms* drafted by insurance

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industry organizations that specialize in drafting. The *standardized forms* are written broadly so they can be used in most or all states for various different types of organizations. Sometimes multiple forms are combined into a single policy, resulting in a very lengthy policy form.

Keep in mind that all insurance policies have certain basic components, usually in the following order:

- Declarations Page
- Insuring Agreements
- Exclusions
- Conditions
- Definitions

Liability policies will also have a “Who Is Insured” section, and almost all insurance policies also have at least a few automatic endorsements amending coverage.

1. Confirm the Essentials

The first page of your insurance policy is the *Declarations*, or *dec page*. This section of the policy, which could be longer than a page in length, summarizes important information about the particular policy at hand. This should include:

- the name or type of the coverage provided under the policy
- the name of your nonprofit, and an indication that it is the “Named Insured,” or the subject of the coverage
- the duration of the policy
- the names or numbers of endorsements that are included in the policy
- the dollar limits of coverage and associated deductibles

Starting with a close review of the *dec page* can be especially useful, because it offers an overview or sneak peak of

the content to come in the narrative sections of the policy. Before moving on to the narrative, make certain that your nonprofit is listed properly in the Named Insured section. Next, confirm that the coverage limits and deductibles are per the instructions provided to your agent or broker when you requested that the policy be “bound” on your nonprofit’s behalf. If the specific details listed on the *dec page* are inaccurate, or you believe that the coverage is less than what you requested or need, contact your agent or broker immediately. It is not uncommon for a policy to contain one or more mistakes that may affect coverage. Remember that the policy is a contract, and until mistakes are corrected and confirmed in writing, the language in the policy governs.

2. Read the Policy Definitions

No matter how common a word might be in everyday language, if it is narrowly defined within a particular insurance contract, the narrow definition will be applied in the event of a dispute over whether your nonprofit is covered. The evolution of the *Definitions* section in commercial insurance policies is attributable, in part, to doctrine of “*contra proferentem*,” a Latin phrase meaning “against the offeror.” The doctrine provides that when a term in a standardized contract is ambiguous and there is unequal bargaining power, the courts will favor the interpretation of the non-drafting party. For example, in a 2013 case involving an insurance company that failed to carefully define the term “occupant,” the court determined that an “occupant” of a vehicle included a pedestrian who was struck by a car while walking her dog (*See Bennett v. State Farm Mutual Automobile Ins. Co.*, No. 13-3047 (6th Cir. 2013)).

Four Quick Tips to Understand Commercial Insurance Policies

1. Take Advantage of Electronic Formats

– Many insurance companies now issue policies in an electronic format with headings that can be clicked on to zero in on a particular policy section or particular endorsement. This makes it much easier to navigate and review the policy.

2. Seek Assistance from Your Agent

– Regardless how small or large your nonprofit is, you should expect your agent or broker to provide you with a written summary of your policy coverages, sometimes called a ‘schedule of insurance’. A detailed schedule of insurance can be an invaluable tool as you review your policies. A complete Schedule of Insurance should list your coverages, show policy limits and other basic information from the declaration pages, and list nonstandard exclusions and endorsements. You should also expect your agent to be available to answer any questions you have about your policies.

3. Monitor Changes

– Reviewing and understanding a commercial insurance policy is hard enough the first time, ideally you shouldn’t have to do it every year. In most states admitted insurance companies are required to advise the insured in writing in advance of any coverage changes or a significant premium increases. You should also expect your agent or broker to advise you of any important changes in coverage.

If your agent recommends changing carriers for any line of coverage, request a side-by-side coverage comparison highlighting differences between the two policy forms.

4. Know the Basics – A package policy for a small nonprofit can easily be more than 300 pages in length. Your fiduciary duty to protect your nonprofit’s mission and assets may not require that you read every word of every page of your insurance policies. And many nonprofit leaders read their policies for the first time when they have filed a claim or after receiving a letter denying coverage for a claim. At a minimum, take time to become familiar with the basic structure of your policies and the information on your Schedule of Insurance, so that you won’t be looking at the basics for the first time if a problem arises. Also, make certain you know your policy limit and key policy exclusions, especially nonstandard exclusionary endorsements. And if you have any ‘claims-made’ liability policies, take time to understand the policy reporting requirements. If you have any lingering doubt about whether and how a potential claim should be reported, contact your agent or broker without delay. Also, contact your agent or broker without delay if you note any mistakes or inaccuracies in your commercial policies, or if you have questions or concerns about any aspect of the coverage purchased to protect your nonprofit’s mission.

...reading a commercial insurance policy without first taking time to understand the meaning of defined terms can be a huge mistake.

Since carriers are not content to rely on the common and potentially ambiguous meaning of terms used in commercial insurance contracts and risk a court ruling based on “contra proferentem,” every commercial insurance policy contains a Definitions section. Defined terms are generally easy to spot, as they tend to be Capitalized, and/or appear in **bold-faced** font, *italics*, or “quotation marks.”

Generally, if a word isn’t defined within the policy, it is defined in everyday language, and may be open to interpretation. However, if a word is defined in the policy, make sure you understand exactly what it covers, and especially what it leaves out. The bottom line is that reading a commercial insurance policy without first taking time to understand the meaning of defined terms can be a huge mistake.

3. Analyze the Policy’s Insuring Agreements

In the *Insuring Agreements* section, the insurer is essentially telling the reader what the policy covers. The insuring agreements define the scope of coverage, which is then narrowed by the policy exclusions. Certain policies, such as General Liability and Directors’ and Officers’ Liability, have very broad insuring agreements. For example the typical D&O policy’s insuring agreement states the policy will cover any “wrongful act.” Other policies,

such as automobile liability, have more specific insuring agreements, with coverage limited to the ownership and use of an automobile.

A policy with multiple coverage parts will have a separate insuring agreement for each coverage part. For example, standard Commercial General Liability (CGL) policies contain a separate insuring agreement for each of its three coverage parts: bodily injury & property damage, personal and advertising injury, and medical payments.

Keep in mind that your policy’s *Insuring Agreements* may have a different name, such as *Policy Coverages*. *Insuring Agreements* frequently contain emphasized words—often in **bold-faced** font, *italics*, or “quotation marks.” This emphasis indicates that those words are specially defined for purposes of the policy, and should not be interpreted to mean something different. In order to understand the meaning of those words as you read the insurance agreements, keep a copy of the Definitions section of the policy close at hand.

The following is an example of an *Insuring Agreements* section of a nonprofit directors’ and officers’ liability policy:

A. The **Underwriter** will pay on behalf of the **Individual Insured**, **Loss** from **Claims** made against **Individual Insureds** during the

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Policy Period (or, if applicable, during the Extension Period), and reported to the **Underwriter** pursuant to the terms of this Policy, for **D&O Wrongful Acts**, except to the extent the **Organization** has indemnified the **Individual Insureds** for such Loss.

- B.** The **Underwriter** will pay on behalf of the **Organization**, **Loss** from **Claims** made against **Individual Insureds** during the **Policy Period** (or, if applicable, during the Extension Period), and reported to the Underwriter pursuant to the terms of this Policy, for **D&O Wrongful Acts**, if the **Organization** has indemnified such **Individual Insureds** for such **Loss**.
- C.** The **Underwriter** will pay on behalf of the **Organization**, **Loss** from **Claims** made against the **Organization** during the Policy Period (or if applicable, during the Extension Period), and reported to the **Underwriter** pursuant to the terms of this Policy, for a **D&O Wrongful Act**.

SOURCE: PI-NPD-2 (/1/02) 0 Flexi Plus Five, Not-For-Profit Organization Directors & Officers Liability Insurance

In the above Insuring Agreements there are seven defined terms: 1. Underwriter; 2. Individual Insured; 3. Loss; 4. Claims; 5. Policy Period; 6. Organization; and 7. D&O Wrongful Acts. In this example, the *Insuring Agreements* tell the reader that the company (Underwriter) will pay losses from claims made against the nonprofit, or losses from claims made against Individual Insureds that have been indemnified by the nonprofit, for “D&O Wrongful Acts.” The subsequent section of this particular policy is the “Definitions,” section, which contains a definitions of three terms

contained in the policy, including one term (D&O Wrongful Act) that appears in the *Insuring Agreements*.

4. Closely Review the Exclusions, Limitations and Conditions

After the *Insuring Agreements* you’re likely to find a section titled *Exclusions*. The *Exclusions* section tells you what is not covered under the policy. Interestingly, many commercial policies have important exclusions that are listed elsewhere! For example the general liability exclusion for fines and penalties is usually found under the definition of “loss” in the definitions section. Other exclusions can usually be found under the Policy Conditions section.

Many policies also provide *Exceptions* to the Exclusions, which may seem strange. However, this is often done to avoid an incredibly long laundry list of all possible exclusions and coverages. Policy *Limitations* will provide the limit of dollar reimbursement available under the policy. In some cases, instead of a specific dollar amount, limits may be in the form of a percentage of the total loss, or a combination of the two forms.

Many policies also include *Conditions*, which are provisions that qualify or limit the insurer’s promise to pay. The *Conditions* section will state the policy provisions and duties required of the insured. For example, duties in the event of a claim, how the policy will respond if there is other insurance, whether the policy is auditable, and under what conditions the policy can be cancelled.

Conditions may be found throughout the policy and are important areas to highlight for reference in the case of a loss, because they often outline exactly what requirements must be

met in order to ensure coverage.

Common conditions in a policy include providing notice to the insurer within a defined period of time, and protecting property after a loss to ensure that more loss isn’t incurred.

5. Don't Skip the Small Stuff

Even seemingly minor details of your policy can be very important. When reading a section that references another section, take note. Immediately refer to the referenced section to ensure that the current section hasn’t been changed significantly.

Also pay specific attention to absolute language (always, never), or inclusive language (and, or). A requirement that a loss be reported to law enforcement *and* the insurer within 24 hours is not the same as a requirement that loss be reported to law enforcement *or* the insurer within 24 hours. Misreading this provision could cause a loss of coverage.

Bridging the Gaps

There are people who claim to enjoy reading insurance policies. You may not be one of them, but hopefully your insurance agent or broker is! The chances are pretty good that you’ll be involved in a claim at some point; don’t wait to take the time needed to understand the role of your insurance coverage as a financing tool for those future risk events you were unable to avoid. ■

The Center is deeply grateful to Board Member David Szerlip of Arthur J. Gallagher & Co., for his invaluable advice and assistance on the content of this article. Emily Stumhofer is Staff Attorney and Project Manager at the Nonprofit Risk Management Center. She welcomes your questions about the topics covered in this article at Emily@nonprofitrisk.org or 703.777.3504.



Contemplating Coverage: Insurance for Nonprofits

By Melanie Lockwood Herman and Erin Gloeckner

Are you suddenly responsible for buying insurance for your nonprofit? Or perhaps you have been responsible for some time but have just realized that there are a few gaps in your understanding of what you buy, why you buy it and how to evaluate providers, products and the process? Or are you starting a nonprofit and unaware of your insurance needs and options? Although we've heard leaders joke that a book on insurance is an instant cure for insomnia, we've also heard that worrying about whether a nonprofit's coverage is "adequate" may lead to sleepless nights. Paying too much for insurance or buying coverage you don't need is a waste of precious financial assets, while ignoring the reality of inadequate coverage exposes your nonprofit to

costly financial losses. The bottom line is that your nonprofit deserves to pay a fair price for the coverage it needs, and you deserve a good night's sleep.

Three Categories: A Simple Framework

The commercial insurance policies purchased by nonprofits fall within one of three broad categories: 1. property coverage; 2. liability coverage; and 3. life/health (benefits) coverage.

- 1. Property Coverage:** this category of policies finances the cost to repair or replace property your nonprofits owns, or property in your care, custody and control.
- 2. Liability Coverage:** this category of policies responds to legal claims and demands alleging wrongdoing on the

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part of your nonprofit. These policies have two components: indemnity coverage to make the victim of harm or loss “whole”; and defense coverage to cover the cost of counsel to represent and defend your nonprofit.

3. Life/Health (Benefits) Coverage:

many nonprofits offer a wide range of benefits to their employees, which may include health insurance, life insurance, and short-term and long-term disability coverage.

Key Considerations

In the paragraphs below we explore some of the key considerations in purchasing commercial insurance for a nonprofit.

- **Consider a la carte or prix fixe** – Many fine dining restaurants offer the option of a “prix fixe” menu — a full meal designed by the chef for a single price. When you order the prix fixe option, you may wind up eating one or more courses that you don’t necessarily need or want. But by opting for the prix fixe selection you get a better deal. Insurance can be purchased a la carte or in packages. Savvy and experienced risk managers may prefer to buy separate policies for separate needs. When you do so you probably have greater flexibility when it comes to customizing the coverage to meet your needs. For example, you may be able to negotiate a change in wording on an endorsement, or have an exclusion removed. Yet many buyers prefer the convenience and savings of insurance policy packages. There is no right or wrong way: it’s a matter of choice.
- **Find a worthy partner** – Many first-time insurance buyers are surprised to learn that when it comes to buying insurance for

a nonprofit, it generally isn’t possible to buy direct. Buying direct means purchasing coverage from the insurance carrier that will be underwriting the coverage. Purchasing commercial coverage—with rare exceptions—generally requires using a licensed intermediary. These licensed intermediaries are referred to as agents and brokers. Although the essential role of your agent is to “place” the coverage your nonprofit needs with appropriate carriers, it’s important to understand that agents and brokers aren’t just middlemen whose participation increases the cost of what you buy. A knowledgeable agent or broker can help your nonprofit make wise purchasing decisions by:

- Pointing out areas of exposure for which coverage is available
- Explaining the terms and conditions contained in the insurance contracts
- Assisting you answer questions contained on coverage applications
- Letting you know about loss control and post-loss assistance available from your carriers

The most important consideration in choosing an agent or broker is finding someone you trust and can depend on. Think of your agent or broker as an extension of your mission, and not a costly “middleman.” A dependable agent or broker will promptly return phone calls, provide thoughtful answers to your questions, and offer coverage options that suit your budget and insurance buying goals. Signs you’re working with someone who isn’t a true business partner include:

- Statements suggesting that no companies want to insure your

“The most important consideration in choosing an agent or broker is finding someone you trust and can depend on. Think of your agent or broker as an extension of your mission, and not a costly “middleman.””

Contemplating Coverage: Insurance for Nonprofits
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- organization because it is a nonprofit, or because of your unique mission or operations
- Delivery of a single option for coverage, at minutes or hours before your current policies expire, accompanied by a “take it or leave it” attitude
- Repeated mention of the small size and inordinate demands of your nonprofit
- **Give the process the time and attention it deserves** – Your right to be frustrated with “last-minute-itis” on the part of your agent is unwarranted if you dragged your feet and only reluctantly provided information needed to complete the applications for coverage. Start the process of considering the insurance renewal at least 90 days prior to your policy expiration date(s). Wherever possible, meet in person with your agent or broker to discuss:
 - **Claims history and experience** – Have you filed claims during the past year? If so, how were they resolved? Were you pleased with the support provided by your carrier, or surprised to receive a declination of coverage letter?
 - **Program and organization changes** – Has the organization grown since the last renewal? What key programs or activities have been launched or discontinued? What new services are on the drawing board for the next year?
 - **Exposure and marketplace changes** – Have there been changes in the marketplace that warrant consideration of new coverages for your nonprofit? For example, are some carriers now excluding claims that they previously covered under the

general liability policy? Have the underwriting appetites of your current carriers changed? Are there any additional companies that would or might be interested in providing coverage for your nonprofit?

Eight Liability Coverages for Nonprofits

The paragraphs that follow explain the basic purpose of eight of the most commonly purchased liability policies. As you read this section keep in mind that:

- Insurance companies (carriers, “markets” and pools) often develop unique, or somewhat unique names for their custom policies; and
- Commercial insurance policies may be purchased as stand-alone products or grouped together in a package.

1. **Commercial General Liability (CGL)** – Most General Liability policies written in the U.S. use the standardized 16-page form drafted by Insurance Services Office, Inc. (ISO). ISO’s Commercial General Liability Coverage Form is commonly called the CGL. The form is designed to insure a wide range of commercial, industrial, and nonprofit operations and various types of claims. The three major components of the CGL are: bodily injury and property damage liability, medical payments coverage, and personal injury and advertising injury liability. The CGL promises to pay on behalf of the policy’s insured parties their legal liability for damages arising out of unintended injuries to non-employees and damage to the property of others. Usually such claims allege that the insured policyholder, through an employee or independent contractor under the policyholder’s supervision, has been negligent and their negligence has caused the injury

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or damage. The CGLs promise includes investigation and defense.

2. **Directors' & Officers' Liability (D&O)** – D&O policies cover claims arising out of the management decisions of volunteer board members, officers, employees, and the corporation itself. Many nonprofit executives view D&O coverage as one of their most important policies. This is not only because D&O insures current and past board members, but also because it is often a prerequisite to attracting new board members. A further attraction is that many nonprofit D&O policies include coverage for the direct liability of the corporation, so-called “entity coverage.” There are no standard D&O policy forms or applications. Each insurer writes its own, resulting in substantial differences among insurers, perhaps greater than in any other coverage field. Each form must be read closely to ascertain the scope of insurance provided.
3. **Employment Practices Liability (EPL or EPLI)** – EPL policies address claims alleging wrongful employment acts. Nonprofits with at least one paid employee are at risk of claims potentially covered under an EPL policy. Some of the most common claims defended by EPL policies are: wrongful termination, employment discrimination, sexual harassment, age discrimination, religious discrimination, wrongful employment decisions that violate the Americans with Disabilities Act, and illegal retaliation. EPL may be purchased as a stand-alone coverage, or as part of a D&O or other management/professional liability policy.
4. **Professional Liability (PL)** – Sometimes called *malpractice insurance or errors and omissions insurance*, professional liability

protects a nonprofit against claims alleging errors and omissions in the delivery of professional services. A growing number of nonprofit organizations recognize the need for this coverage, including social services agencies, health clinics, and more.

5. **Sexual Abuse and Molestation** – Sexual abuse and molestation is a tragic societal problem that reaches a wide variety of organizations, including nonprofits. Historically, until the mid-1980s, coverage for sexual abuse claims who not always addressed specifically within policies, thus leaving the policies open to interpretation. Policyholders would claim that their general liability policies provided coverage, while insurers disagreed. Today sexual abuse and molestation coverage can be proactively covered in a variety of ways: as a stand-alone policy form developed specifically to address this coverage, as a separate section of a package policy, or as an add-on to a professional liability policy. All organizations that work with vulnerable clients should consider purchasing this coverage.
6. **Automobile Liability** – All nonprofits rely on the use of automobiles to some extent and may have legal obligations arising out of their use. Automobile accidents are one of the more obvious sources of liability claims—typically from an employee or a volunteer driving an organization-owned vehicle. If employees or volunteers use their own vehicles in furtherance of the nonprofit's activities, the nonprofit may have some secondary legal responsibility. Automobile liability insurance for nonprofits is provided by commercial policies that are quite straightforward and somewhat similar

to personal automobile insurance policies. A complicating factor is that there are substantial differences state-to-state in the liability exposures and insurance requirements. For example, Michigan requires no-fault Personal Injury Protection coverage, while Illinois mandates legal liability coverage with minimal limits.

7. **Cyber Liability** – A growing number of insurers offer different forms of cyber liability coverage, but many policies address similar coverage areas. Cyber liability policies may include third party and first party coverages. Third party coverage protects the insured organization against claims that arise from losses suffered by third parties, such as donors or clients. First party coverage protects the insured for its own losses. Examples of specific coverages available under a cyber liability policy include: notification expense coverage, crisis management, regulatory investigation expense, data breach liability, content liability, data loss & system damage (data restoration) coverage, and business interruption. For more information on this exposure and available coverage, see: [Data Privacy and Cyber Liability: What You Don't Know Puts Your Mission at Risk at www.nonprofitrisk.org](#)
8. **Umbrella and Excess Liability Coverage** – This category of insurance includes high-limit legal liability policies intended to cover losses that are not fully insured by other policies, either because the dollar amount of the liability incurred exceeds the limits of the other liability policies, or because the nature of the loss is not insured by the underlying or lower limit policy. Umbrella Liability Insurance policies provide legal liability coverage for various types of injuries and property damage

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arising out of accidents that occur during the policy period. Umbrella policies provide additional dollar limits of coverage over and above the dollar limits of other liability insurance policies that are written with an accident/occurrence trigger. These other policies are often called *primary* policies and, with respect to the Umbrellas, *underlying* policies. Three common *underlying policies* are the CGL, Automobile Liability, and Employers Liability (Part B. of the Workers Compensation Insurance policy). In the event that the per occurrence or aggregate limit of an underlying policy has been used-up or exhausted, an Umbrella policy will effectively drop-down to afford additional limits up to the Umbrella's maximum limit of liability. Of the three policies noted above, only the CGL has aggregate limits, but all have per occurrence maximum limits.

Excess Liability Insurance policies provide additional limits and drop-down coverage for the underlying policies that are identified in the policy. However, unlike Umbrellas, they can provide excess limits over policies written with a claims-made trigger. Thus, a nonprofit organization may have two policies providing additional limits above its primary policies: an Umbrella and an Excess Liability Insurance policy. Some insurers will provide a combined policy with Umbrella coverage and Excess Liability coverage over the claims-made primary policies.

Four Property Coverages for Nonprofits

1. Building and Contents Coverage

– Nonprofits have many options for insuring owned or leased buildings, their contents, other personal

property, and property that belongs to others but is used by the nonprofit. Coverage is also available to offset the consequential financial impact generated by the loss of use of your property. It is important to identify and consider all these options and choose the ones that best fit your needs. It is important to know what you want before you begin.

Today most property insurance for nonprofits is written in a package policies that combine property coverage with basic legal liability coverages. Most insurers offer premium credits for package policies. However, stand-alone property policies are still available and they can provide coverage as broad as is available under package policies. In some cases a stand-alone property policy may be more comprehensive and preferable to a package. In general, the coverage available for nonprofit organizations is the same as that offered to corporate commercial accounts.

Standard ISO basic policies describe “covered property” as:

- Buildings, their machinery, maintenance equipment, appliances, outdoor furniture, additions, and construction materials.
- The personal property, including furniture, leased property you are obligated by contract to insure, and, if you lease the premises, your interest in the alterations to the building and other “improvements or betterments,” and personal property of others over which you have control at or near your buildings.

2. **Crime Coverage** – A crime policy is generally a package of policies that protect an organization against intentional theft by insiders, as well as the theft of assets by third parties. The term *fidelity bond* is often used interchangeably with crime coverage.

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Insurance Resources for Nonprofits

The Center's forthcoming book, *COVERED: An Insurance Field Guide for Nonprofit Executives*, will be published in Fall 2015. The book offers detailed chapters containing additional insights and recommendations regarding insurance program management and each of the coverages discussed in this article.

Additional Resources Include:

www.nonprofitrisk.org/library/eneews/2007/eneews060607.htm

www.nonprofitrisk.org/advice/faqs/insurance2.shtml

www.nolo.com/legal-encyclopedia/insurance-types-for-nonprofits-32393.html

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State workers' compensation statutes typically mandate that the employer provide for the injured employee's medical expenses, rehabilitation costs, and a portion of lost wages.

Technically, however, a fidelity bond—also called an *employee dishonesty bond*—is actually just one component of a broader crime policy. In addition to the employee dishonesty component, a crime package may include:

- **Forgery or alteration** – Coverage for accepting forged documents when the forgery was committed by non-employees, and accepting a check from an imposter. It also provides a defense to a nonprofit for refusal to honor a document that it thinks is a forgery.
- **Theft, disappearance and destruction** – Broad theft coverage for any act of stealing committed by non-employees, both on and off the insured's premises, with few restrictions.
- **Robbery and burglary** – Coverage for robbery of a night watch person, a custodian, or a courier going to the bank, and burglary from the premises or a safe.
- **Computer fraud** – Covers unauthorized transfer of money or other property (such as a proprietary mailing list) committed by non-employees from a computer

inside the premises to a computer or printer outside the premises.

- **Extortion** – Covers the kidnap of a person by a non-employee with a threat of bodily harm unless a ransom is paid.
 - **Liability for another's property** – Offers protection against theft of a client's property stored in a safe or safety deposit box.
3. **Workers' Compensation** – When a nonprofit hires employees it takes on many new responsibilities, including potential legal liability for their on-the-job injuries. State workers' compensation statutes typically mandate that the employer provide for the injured employee's medical expenses, rehabilitation costs, and a portion of lost wages. While there are federally mandated minimums for these state programs, there is no uniform national law. Every state requires virtually all employers to provide workers' compensation coverage. Exceptions are sometimes made for very small employers, and for domestic and agricultural workers. For example, Kansas exempts agricultural employers and

those with gross annual payrolls of not more than \$20,000. Insurance provided by private insurers follows the state law requirements and also provides additional coverage for any common law liability of the employer. Workers' compensation insurance covers the entire scope of the state statute. Each state administers and oversees its workers' compensation benefit program through a board or commission. However, most claims are resolved between the insurer's claims adjuster and the injured worker, health service providers, a third party administrator retained by large employers, and the worker's attorney, if one is involved. Employees who disagree with the assessment and evaluation of their claim by the claims adjuster can appeal to the state commission that adjudicates or arbitrates claims. Employers and workers can appeal these administrative decisions to state courts, but appeals are infrequent, as they must relate to the arbitrator's interpretation of the statute and not to the underlying facts in the case.

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4. Business Interruption and Extra Expense – Business interruption and extra expense policies reimburse an insured for the loss of net income plus expenses during a period when the insured cannot operate normally due to damage or destruction of property. For example, due to a fire at the headquarters building owned by a youth-serving nonprofit, the organization is unable to host an after-school program that generates \$10,000 in net income each month. The nonprofit incurs additional expenses to notify the parents of participants as well as additional expenses to rent office space from which administrative operations can continue. Like other forms of coverage, business interruption coverage is based

on the principle of indemnity, which provides that insurance should put the insured or damaged party in the same position as they were prior to the loss—no better and no worse. Business interruption claims are somewhat difficult to resolve because they rely on projections of future income streams and expenses. As is true with other forms of property coverage, the insured nonprofit has the burden of substantiating its losses to the insurance carrier. ■

Melanie Lockwood Herman is Executive Director and Erin Gloeckner is Project Manager at the Nonprofit Risk Management Center. They welcome your questions about insurance for nonprofit organizations at 703.777.3504 or Melanie@nonprofitrisk.org or Erin@nonprofitrisk.org.

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