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WHY PHYSICIAN GROUPS NEED DIRECTORS & OFFICERS INSURANCE

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You have a professional insurance provider that placed all the crucial insurance coverages a healthcare facility or physician group requires. The group purchases workers' compensation insurance to protect employees, general liability for third-party lawsuits, auto liability for driving exposures, medical professional liability to protect the providers, employment practices liability to defend allegations of employment-related events, and most recently, a cyber liability policy. The organization is completely covered now, right?

All of these coverages are crucial, but unfortunately, a significant gap in coverage remains for healthcare organizations. When an entity receives a lawsuit, most expect their general liability or medical professional liability to defend and indemnify the organization. As broad as a commercial general liability policy is, it will not respond unless allegations of property damage or bodily injury are involved. The medical professional policy, on the other hand, only applies narrowly to claims of professional negligence.

WHAT IS D&O INSURANCE?

Directors and officers (D&O) insurance, however, applies to other types of third-party lawsuits that are excluded in the core coverages mentioned above, assuming they do not involve property damage, bodily injury, professional negligence, or breach-related events.

A D&O policy will potentially defend against employment-related claims, shareholder lawsuits, competitor allegations such as misrepresentation or infringement, and any accusations resulting from disputes with patients, creditors, or vendors.[1] Regulatory agencies are also a common source of claims a D&O policy can protect against.[2] While an employment practices (EPL) policy will likely defend against any employment-related suits, the claim may be excluded by a standard EPL policy if the employee is contracted; the D&O policy may offer coverage where the EPL policy does not. However, for any other allegations from other parties, it is unlikely a policy other than D&O will respond.

Let's discuss some actual claim scenarios.

Many D&O claims relate to mergers and acquisitions. For example, say that a physician group is approached by an investor looking to grow a portfolio of dermatology clinics. Following the acquisition, the acquiring company determines that past revenues were recorded inaccurately, and as a result, the valuation was artificially inflated. The previous owners/managers are sued for failure to provide accurate financial history.[3] This type of suit would only be defended by a D&O policy and is likely to prove expensive to do so.

Other D&O claim examples involve potential mergers that are not completed. One of the involved entities sues

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the other, suggesting that there was no true intent to merge but rather just an attempt to seek intelligence on a key competitor.

D&O AND THE HEALTHCARE INDUSTRY

While D&O policies can apply to all industries, the healthcare industry and its leaders are under tremendous pressure due to regulations and laws, and COVID-19 is, of course, adding onto that greatly.[2] A D&O policy provides coverage for some of the areas that are most concerning to healthcare facilities, including peer review and credentialing, participation on outside boards, Emergency Medical Treatment and Active Labor Act (EMTALA)-related claims, allegations of antitrust, HIPAA violations, and regulatory claims. HIPPA violation coverage is typically limited to an amount well below the full policy limit, but the D&O policy is likely to be the only source of insurance for these issues. Regulatory claims generally are defined in the policy to include errors or misstatements about Medicare and/or Medicaid. The policy will not compensate for over-reimbursements, but it may provide a sublimit to cover the defense costs pertaining to governmental payers' regulatory action.

It is premature to definitively state how COVID-19 will impact the healthcare D&O marketplace. The D&O market had already been hardening for a couple of years before the pandemic began affecting the U.S. Rate increases of 10% or more per year have been common. The rate increases are much larger for risks with poor experience because, unlike auto or property insurance, D&O claims are expected to be infrequent. Therefore, D&O pricing is hypersensitive to losses, particularly if they are recent. The pandemic certainly will not help stabilize the D&O marketplace, and we may very well see new types of claims being submitted alleging:

- Inadequate risk controls and IT system capabilities
- Poor projections for revenue and expenses during the COVID-19 impact
- Failure to implement appropriate and required health and safety precautions
- Wrongful and/or unnecessary dismissal of staff
- Failure to communicate the COVID-19 financial effects on the organization with investors, lenders, and/or partners[4]

Assuming that your facility already purchased employment practices liability, cyber liability, and/or fiduciary liability insurance, it is likely that an insurer may be able to quote the addition of D&O coverage to one or all of those on a package basis. There is generally a significant discount provided by insurers when purchasing multiple coverages falling under management liability. Therefore, the cost to add D&O insurance may be less than anticipated because of the savings achieved on the other policies.

Discuss D&O coverage with your insurance provider and create a plan to obtain quotes from multiple insurers with varying limits and retentions. Higher retentions do reduce premiums for D&O coverage. Large retentions can be painful, but foregoing D&O coverage completely puts the organization's ability to weather a significant lawsuit in jeopardy. Reach out to an experienced insurance broker if you would like more information.

References and Resources

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4. Directors' and Officers' Liability in Times of a Global Pandemic Crisis, https://www.legal500.com/guides/hot-topic/directors-and-officers-liability-in-times-of-a-global-pandemic-crisis-do-desperate-times-really-call-for-desperate-measures/