

Ohio Employee Ownership Center

23rd Annual Meeting

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ESOP Fiduciary Responsibility

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Fiduciary Liability Insurance

Who/What is Covered?*

- The Plan(s)
 - ESOP
 - Other Retirement Plans
 - Health/Welfare Plans
- Plan Sponsor or Employer
- Individual Persons

** Not to be confused with the ERISA bond or Employee Benefit Plan Liability!*

Fiduciary Liability Insurance

Insured Persons (Fiduciaries) are:

- Directors
- Officers
- Partners
- Trustees
- Employees
- Outside Trustees (maybe)

Of the Plan Sponsor or Plan

Fiduciary Liability Insurance

What is covered?

- Alleged or actual violation of responsibilities or duties imposed on fiduciaries by ERISA
- Alleged or actual act, omission, error, breach of duty in the administration of the Plan.
- Any other matter or claims against any insured solely by reason of their status as a fiduciary

Fiduciary Liability Insurance

Typical Exclusions

- Any Insured gaining any profit or remuneration not entitled to.
- Fraudulent or criminal acts*
- Intentional non-compliance with any statute or regulation by an insured
- Prior or pending civil, criminal or administrative proceeding
- Bodily Injury, property damage, mental anguish, libel or slander
- Pollution
- Benefits paid or owed

*Exclusion applies only if adjudication determines acts did in fact occur.
Wrongful Act would not be imputed to other insureds

Fiduciary Liability Insurance

Considerations:

- “Claims Made” Form
- Are Prior Acts Covered?
- Waiver of Recourse Against Fiduciaries
- The Extended Reporting Period or Discovery Options
- Policy Limits usually include defense costs
- Duty to Defend vs. Pay on Behalf Wording
- Can be combined with D&O and EPLI coverage
- Policy Limits start at \$1,000,000
- Deductible Options: \$0/\$1,000/\$2,500/and higher

Fiduciary Liability Insurance

The “Claims Made” Form:

1. Coverage Trigger: For a claim to be considered covered, it must be filed with the insurer while the policy is in effect or during the *Discovery or Extended Reporting Period* pertaining to a Wrongful Act occurring on or after the policy’s *Retroactive Date*, if any.
2. Prior Acts Coverage: Some policies will have a *Retroactive Date* on the Declarations Page of the Policy thereby covering only Wrongful Acts occurring on or after this date and filed during the current policy term or during the Discovery period. The *Retroactive Date* is usually the date coverage is first purchased. Note: Important if trying to change insurers.

Fiduciary Liability Insurance

“Claims Made” Issues, cont.

3. Pending & Prior Litigation (P&P) Date: Will not cover any claims or litigation filed against insured prior to that date. Date will be shown on the Declaration Page of the policy.
4. Coverage Continuity: Addresses both Retroactive Date and Pending & Prior Litigation Date. If changing insurers, make sure the new insurer will adopt the same Retroactive Date as well as the same P&P Date. Have new insurer accept a completed and signed “renewal application” or agree to waive the warranty questions on their main form application regarding previous claim activity.

Fiduciary Liability Insurance

“Claims Made” issues, cont.

5. Extended Reporting or Discovery Period: If policy is ever cancelled or non-renewed for any reason, insured has the right to purchase from the insurer, an Extended Reporting Period. This allows an insured to file a claim after the policy has been cancelled or non-renewed during a specified time for a Wrongful Act which occurred prior to the date of cancellation or non-renewal. Extension usually is one, two or three years. Additional premium is required.
6. Change in Ownership: Should the insured be acquired, the policy will automatically go into the Extended Reporting or Discovery Period to cover claims involving the prior company or plans. New Company must purchase their own insurance.

Fiduciary Liability Insurance

“Duty to Defend”:

Will obligate the insurer to defend the insured once the claim is filed. However, insurer will assign it's own defense counsel and control the defense of the claim.

“Pay on Behalf”:

Insured is responsible to defend itself but must coordinate with insurer. Insurer can choose own counsel.

Fiduciary Liability Insurance

Policy Limits:

- No set formula widely used.
- Usually start at \$1,000,000
- Is policy limit combined with other coverages such as D&O or EPLI?
- Keep in mind that defense costs (attorney fees) in most policies erode the limit of liability.

Fiduciary Liability Insurance

Policy Premiums:

- Based on size of Plan Assets and Financial condition of Company
- Number and type of Plans covered
- Limit of Liability and whether it is shared with D&O and EPLI
- Retentions- although not a significant factor in reducing (or increasing) premiums

Fiduciary Liability Insurance

Underwriting Requirements:

1. Completed and Signed Fiduciary Application
2. Copy of most recently filed Form 5500
3. Copy of most recent Financial Statement
4. ESOP Questionnaire
5. Copy of Share Valuation Report

Note: 4 & 5 may not be required by all insurers

Fiduciary Liability Insurance

Claim Examples:

Check out Department of Labor Website

<http://www.dol.gov/>

Request sample from insurer or
agent/broker

Fiduciary Liability Insurance

Other Exposures to an ESOP Company

- Shareholders
- Employees
- Government Agencies
- Suppliers and customers
- Competitors
- Creditors

Fiduciary Liability Insurance

Other Insurance Considerations:

- D&O Liability Insurance
 - Strongly recommended
 - Place it with same insurer as the Fiduciary
- Employment Practices Liability Insurance (EPLI)
- Crime

For More Information

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