

Directors' & Officers' Liability:
How Are You Managing?

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Who is responsible? And why?

Leadership

Leadership is Strategic: Why you do it

- ✓ Establishes direction, vision, strategy
- ✓ Aligns personnel through words and deeds
- ✓ Motivates, inspires to overcome barriers

Leadership Goals

- ✓ Set the overall direction and vision
- ✓ Are communicated so they are understood and applied through policies, operating principles and training
- ✓ Governance with clear roles and responsibilities
- ✓ Develop and implement plans/tools that build long-term sustainability and capacity
- ✓ Excellence in management practices
- ✓ Innovation and empowerment that is encouraged with guidance and assistance
- ✓ Managers/employees/volunteers encouraged to develop and improve skills

VS.

Management

Management is Tactical: How you will do it

Carry out the plan, purpose, mission

- ✓ Steering the vehicle, selecting the routes

Manage and allocate resources

- ✓ Financial and personnel (the engine)

Control and solve problems

- ✓ Regularly assess progress (check road conditions/weather reports)
- ✓ Adjust course when advisable or necessary

Communicate

- ✓ Provide status (travel) reports to stakeholders

Implement the policies and procedures

- ✓ (Driver training and licensing)

Governance = Leadership + Management

- = Processes + structures used to direct/manage general operations/program & program activities
- = Responsibilities, practices & traditions used to accomplish a mission
- = Determines how power is used, decisions are made, how stakeholders influence, who is accountable
- = Values determine purpose & style of operations

Good Governance: Vital Components

Vision

Plan for the future
What you are trying to achieve?

Destination

Setting goals/roadmap
Where are you going? How will you get there?

Resources

Securing/sustaining what is needed to reach the goals:
personnel/finances

Periodic assessment/adjustment
Conduct maintenance, upgrades, tune-up

Monitor

Ensure effective use of resources
Report progress/detours

Accountability

Board of Directors Authority & Responsibilities

- ✓ Govern the organization with broad policies, strategies and objectives
- ✓ Determine, lead and guide the nonprofit to fulfill its mission and purpose
- ✓ Acquire and ensure resources are available (financial, personnel)
- ✓ Select, appoint, support and review the executive's performance
- ✓ Ensure effective organizational planning
- ✓ Determine and monitor the organization's programs and services
- ✓ Comply with the stated objects, mission and purpose (as stated in bylaws)
- ✓ Enhance the organization's public image
- ✓ Serve as a court of appeal
- ✓ Account to the public for the services of the non-profit
- ✓ Assess its own performance
- ✓ Management of the nonprofit to ensure:
 - The nonprofit's purpose is properly carried out
 - Financial stability and overall performance
 - Supervision of management and staff

Statutory Responsibility

- ✓ Obey all laws relating to individuals and employers
- ✓ Be familiar with labour standards, human rights and occupational health and safety legislation
- ✓ Be aware of laws also regulating fundraising
- ✓ Comply with regulations for the maintenance of nonprofit incorporations and charitable status

Board Due Diligence

Fiscal Responsibility

- Develop budget and monitor performance relative to that budget
- Avoid a deficit
- Insuring the collection and remittance of required payroll deductions (income tax, UI and CPP)
- Insuring resources are not used for the personal gain of officers and directors
- Maintain financial records

Contracts

- Understand the nonprofit's major contractual obligations, especially to funders
- Monitor the organization's compliance with them

Standard of Care

- Insure practices are in place to reduce the risk of harm to its employees, volunteers and clients

Standard of Care Owed

- Expected of an individual in relation to the duty owed to others
- Individuals are liable when their conduct is below that expected by the community
- "Reasonable and Prudent person" standard
 - whether the nonprofit acted as a reasonably careful person in the same circumstances

Monitoring of Performance

- Regular review of income and expenditures (actual compared to budget)
- Annual review or independent audit of financial results (financial statements)
- Review reports on activities (i.e. monthly executive director's report)
- Monitoring the implementation of key policies, programs, activities

Statutory Requirements (Laws): Must Do's

- ✓ Election/appointment of directors & officers
- ✓ Call meetings of members
- ✓ Keep meeting minutes of directors/members
- ✓ Pay taxes and employment remittances
- ✓ Report and disclose required information to government
- ✓ Pay wages and salaries
- ✓ Ensure and maintain a safe working place

Directors Authority & Obligations

Directors are the “guiding minds” of an organization, in other words, they are the navigators. They hold the authority and responsibility for the direction, activities and operations. Directors are obligated to use the power vested in them on behalf of the nonprofit and exercise power with competence and diligence.

Fiduciary duties: *obligation to act in the best interests of the nonprofit*

Directors must be able to demonstrate that they “manage the affairs” of the organization

Fiduciary Duties

- ✓ Duty to act honestly
- ✓ Duty of loyalty
- ✓ Duty of diligence/to act in good faith
- ✓ Duty to exercise power
- ✓ Duty of obedience
- ✓ Duty to avoid conflict of interest
- ✓ Duty of prudence
- ✓ Duty to continue
- ✓ Duty of Loyalty
 - Allegiance to the nonprofit’s mission and to further its cause
 - Use their power in the best interests of the nonprofit
 - Always disclose the entire truth in any dealings
 - Avoid all conflicts of interest
 - Subordinate personal interests, cannot profit from their position
 - Exhibit high standards of honesty and good judgment
- ✓ Duty of Diligence
 - Obligation to be informed about the nonprofit’s purpose and all aspects of its operations
 - Requires active, concerted effort to be engaged and ready to make informed decisions

Practical Examples

- Understand and comply with the stated mission/purpose
- Be informed about board decisions
- Exercise independent judgment when voting
- Review regularly all of the nonprofit’s financial reports
- Be aware and ensure all key policies are in place
- Obtain necessary legal and accounting advice
- Attend board meetings regularly

Key Success Factors:

- ✓ Strong board and staff leadership
- ✓ Relationships between board and CEO that show mutual respect and flexibility
- ✓ Clear understanding and expectation of roles
- ✓ Stakeholder agreement on values, mission, goals
- ✓ Board development practices: orientation, training, recruitment, meeting management
- ✓ Regular performance appraisals of board, directors and CEO
- ✓ Consensus decision making, constructive conflict resolution

What can go wrong and why?

Warning Signs

- Rapid turnover board members and CEO's
- Difficulty recruiting/retaining board members
- Chronic deficits, depletion of reserve funds
- Persistent failure to meet performance targets
- Poor attendance at meetings, members unprepared
- Underground political maneuvering
- Unresolved conflicts, poor communication
- "Rubber stamping" financial statements or CEO recommendations
- Role confusion between board and CEO
- Board interference in operational details
- Poor communications with stakeholders
- Decision deadlock/paralysis
- Ignoring/circumventing Board policies and decisions

Wrongful Act Allegations

- Conflict of interests, acting beyond their authority
- Giving wrong advice, breach of fiduciary duties
- Misrepresentation of reports, financial statements
- Breach of contract, torts, violation of statute laws
- Violation of by-laws
- Improper self-dealing, fraudulent conduct
- Acquiescence in conduct of fellow directors
- Transactions with companies in which officers or directors are personally interested

Mistakes/Errors

- Disclosure of material facts, false or misleading reports
- Employee dismissal
- Dissemination of false or misleading information

Financial Mismanagement Allegations

- Authorizing excessive spending, unauthorized borrowing
- Inefficient administration resulting in losses
- Sale of assets for unreasonably low prices, wasting of assets

Negligence Allegations

- Failure to supervise subordinates or affairs properly
- Continual absence from meetings – shirking responsibility
- Failure to examine reports/documents before signing
- Failure to detect/stop embezzlement of funds
- Failure to file annual report, failure to require withholding tax
- Failure to inspect nonprofit's books and records or keep informed of its activities
- Failure to verify facts in official documents before signing them and filing them

Who are Claimants/Stakeholders?

<u>Current/former staff:</u>	Allege wrongful termination, discrimination, sexual harassment
<u>Outsiders:</u>	Vendors or other nonprofits
<u>The Entity:</u>	Nonprofit brings action against its directors or officers
<u>Directors:</u>	Sue other board member alleging violation of a duty owed
<u>Beneficiaries:</u>	Those you work to help
<u>Members:</u>	Allege harm to their interests
<u>Donors:</u>	Contributors sue directors & officers alleging misuse of a restricted gift
<u>Government Officials:</u>	Bring actions alleging violation of provincial or federal laws



Vicarious Liability

Nonprofits are liable for the acts or omissions of its directors, officers, staff and volunteers, and require those who undertake an enterprise to take all reasonable measures to reduce risk of loss by others.

Canadian law requires:

- ✓ We be aware of the losses we cause
- ✓ Attempt to reduce the risks of such losses
- ✓ Compensate those who suffer as a result

Un-incorporated?

- ✓ No legal status therefore it cannot incur liabilities or be convicted of an offence
- ✓ Members can be personally liable for its acts or omissions
- ✓ Members' personal assets are at risk

What Can/Should You Do: Risk Management



“Any organization that provides programs to the public has a moral, legal and spiritual obligation to institute appropriate risk management practices for volunteer programs. This is not only the right thing to do; it is legally required under the principle of duty of care.”

*Marlene Deboisbriand
President, Volunteer Canada*

Every activity your nonprofit undertakes has inherent risks and potential liability. Risk management is a proactive process that manages those risks and resulting outcomes. Its purpose is to avoid, reduce or prevent risk from imposing negative consequences.

Strategic Objectives

- Risk Identification and Mitigation
- Be ready to take advantage of opportunities
- Reduce uncertainty – confidence in future
- Be a good citizen
- Fulfilling legal and ethical issues reduces chances of being sued (downside risk)
- Fosters favorable public image – improves public support that attracts volunteers and funding
- Fulfills community service mission

Risk Identification and Mitigation:

- Significant risks to the operations identified and action taken to minimize their consequences
- No process is 100% effective
- Best practices: Manage risk through a systematic approach that minimizes the possibility that risk will go undetected

Benefits

Consideration of uncertainty causes decision makers to:

- Think more carefully about all issues
- Identify factors most and least important
- Plan for contingencies
- Set priorities to manage those issues
- Creates savings in time, effort and financial resources

The average person:

- Accepts risk based on their perceptions of the consequences, not necessarily the facts
- Perceptions are influenced largely by their personal background and any previous exposure to the risk
- Values a risk differently depending on how the loss affects their needs, issues and concerns

Personal Risk Acceptance

- Degree of personal control: less accepting with no control
- Potential of an event to cause catastrophic consequences
- Less accepting of a painful death rather than quick – end result the same
- Distribution of risks and benefits:
 - accept greater risk if benefit results from the activity
 - less accepting of uncompensated loss
- Degree to which exposure to the risk is voluntary – NIMBY
- Degree of familiarity with the activity

Risk Management Concepts

Risk includes three key issues:

- The frequency of loss occurring (how often)
- The consequences of loss (how costly/severe)
- The perception of loss (affect on stakeholders needs, issues, concerns)

Risk management activities:

- ✓ Go beyond buying insurance
- ✓ Prevent, control and manage losses
- ✓ Seek alternative approaches to finance risk.

The Risk Management Process

Risk management as a process:

- Seeks to prevent or minimize the financial impact of actual and potential losses
- Preserves the assets of the nonprofit in a responsible ways
- Manages uncertainty, whether that uncertainty produces results better or worse than expected

When documented:

- Provides basis for and explanation of all decisions
- Enhances any defense of those decisions, if needed
- Reference and resource for future decision making
- Record of all proceedings
- Communication of decisions to all stakeholders
- Increased trust between decision makers and stakeholders

Risk Management decisions enable:

- Achievement of nonprofit mission and objectives
- Management of the uncertainty and consequences of future events
- A continuous, proactive and systematic process to understand, manage and communicate risk
- Establish the most cost-effective procedures to ensure funds are available to pay for the consequences of a loss

What is Risk Management?

- ✓ Identifies threats and opportunities through ongoing internal and external examination, analysis and adjustment
- ✓ Plans organizational-wide strategies to manage risk filtered through the organization's challenges, opportunities, capacity, practices and culture
- ✓ Assesses the nonprofit's ability to:
 - Respond to risk
 - Determine its risk tolerance
 - Understand its ability and capacity to mitigate risk
 - Realize the training and learning needs of its personnel to implement the risk management plan

Risk management considers:

- ✓ The overall management framework
- ✓ Governance and accountability structures
- ✓ Values and ethics
- ✓ Operational work environment
- ✓ The current risk management culture and tolerances
- ✓ Existing risk management expertise and practices
- ✓ Human resources capacity
- ✓ Local and corporate policies, procedures and processes

*“Finance” risk means
“to pay for the cost of risk”*

Risk Factors

Types of risk

- Technological, financial, human resources (capacity, intellectual property), health, safety

Sources of risk

- External can include political, economic, natural disasters
- Internal includes reputation, security

What is at risk

- Areas of impact
- Types of exposure to people, program results, materials, real property

Ability to control the risk

- Mitigation through loss prevention and risk transfer

Decision Analysis: Retain vs. Transfer

Low frequency / low severity losses: Consider retaining the risk

Low frequency / high severity losses: Consider loss reduction and/or insurance transfer

High frequency / low severity losses: Consider loss prevention techniques if possible

High frequency / high severity losses: Consider exposure avoidance

Risk Management works when:

- Aligned with an organization's overall objectives, strategic direction, operating practices and internal culture
- It is a factor setting priorities and revenue allocation
- Integrated within existing governance and decision-making structures at the operational and strategic levels (board of directors)

Critical Success Factors

- Strong involvement by upper management
- Organized process for risk analysis and response
- Assignment of specific risk responsibilities
- Workplace where employees understand their role in managing risk

Risk Management Objectives

- ✓ Preserve the organizations assets, reputation and operations
- ✓ Minimize disruption of the operations
- ✓ Manage risk in the most cost effective manner

Capacity for Managing Risk?

- Governance and decision-making structures
- Planning processes
- Infrastructure
- Human and financial resources

Current risk management culture; its risk management processes and practices, includes:

- Management's knowledge, skills, experience, risk tolerance, propensity and willingness to take risk
- Strategic direction
- What elements affect risk decisions
- How risk is managed

Balance of Techniques considers:

- ✓ The entity's risk tolerance
- ✓ Laws or internal rules
- ✓ Cost versus benefit
- ✓ Cost advantages

Pre-Loss Objectives

Economy of Operations
Tolerable Uncertainty
Legality
Humanitarian Conduct

Post-Loss Objectives

Survival
Continuity of Operations
Stability of earnings and funding

The Analytical Process

1. Identify and analyze the entity's risks
2. Evaluate risk management techniques that address those risks (what will work best)
3. Select the most appropriate techniques
4. Implement the selected techniques
5. Monitor and change the risk management program as needed (make sure it continues to work well)

Risk Identification

- Defines the problems or opportunities, and associated risk issues
- Decide on the people, expertise, tools and techniques
- Perform stakeholder analysis (determining risk tolerances, positions and attitudes)

Practical Strategies

Assume the risk (decide that the risk is minor and do nothing)

Reduce the risk (change people's behaviour or the environment where they work so that risk is reduced)

Pre-loss activity example: preparation, before a loss occurs, of contingency plans to expedite recovery from the loss

Eliminate the risk (choose not to do something)

Avoidance: remove the risk-producing activity entirely or never begin it

Transfer the risk (accept the risk but transfer its liability to someone)

Give the consequences for performing risky activities to another party

Control: Post-loss, control keeps the resulting damages to a minimum and controls the contingent consequences.

Examples:

- Effective administration of third party claims
- Use of previously established contingency plans to reinstate disrupted services

Contractual risk transfer: Assigns the risk of a specific activity or project to another party through a contract

Example:

- Assign responsibility to a contractor or vendor for the risks of loss arising from its provision of goods or services (Insurance is a form of risk transfer)

Risk Financing

- Techniques to finance losses that reduce or transfer the uncertainty about the financial impact of losses
- Risk financing techniques include: Retention and Transfer

Risk Communication

- Critical process, stakeholders need to know
- Builds trust and encourages buy-in through sharing decision-making
- Reduces misperceptions, misunderstandings
- Improves the technical understanding or “science” or what needs to be done

Consultation with Stakeholders

- Will not always reduce conflict or make decisions easier
- Facts may not be enough that a decision can be made (personal perception of risk)
- Stakeholders resent imposed risk and decisions made without their input
- People have right to be involved in decisions that affect them

Without Communication: The Downside

- Loss of management credibility
- Protracted, unnecessary, costly debate and conflict with stakeholders leading to difficult approval processes
- Diversion of management attention from important issues
- Non-support or critical management, employees, volunteers
- Stress due to high levels of anxiety and fear of unknown

Effective Risk Management Plans

- Reflect a nonprofit’s wide range of stakeholder perspectives
- Express the belief in and support of risk management
- State that all personnel are vital in protecting the nonprofit’s mission, reputation and assets
- Incorporate existing risk management policies
- Reflect the goals for the risk management effort
- Focus on priority risks and consider secondary risks

Transfer to Insurance

- Some exposures may be uninsurable
- Insurance policies have coverage exclusions
- Losses may exceed policy limits

Implementation

- Assign responsibility and accountability for the implementation of each selected technique
- Allocate required resources
- Document the implementation in writing
- Establish milestone dates and other evaluation criteria for measuring performance

Implementation Strategies

- Define framework — Risk Management Plan
- Risk management policy — state in writing
- Risk champion
- Task force
- Guidelines and training

Best Practices

- Commitment and support from leaders
- Risk management plan provides roadmap
- Policy statement defines the commitment
- Risk mitigation — control system standards
- “Learn by Doing” training
- Monitoring and assessment
- Communication: consistent and frequent

Monitoring

Are selected risk control and risk financing options achieving their expected results? If not, make adjustments where/when needed.

Examples:

Update values in the property insurance policy, because they may have changed substantially
Remarket the risk financing program to ensure competitiveness of pricing or coverage

Monitoring considers:

- Identify new operations or property changes that affect the entity's exposure to risk
- Inspect property, activities and operations regularly for exposure changes
- Proper implementation of control, financing and communication strategy

Benefits of monitoring include:

- Identification of new or changing risks
- Accumulation of evidence to support assumptions and results of analysis
- Development of a more accurate portrait of risks
- Reduction of costs associated with improper or redundant risk control measures

Operational Recommendations:

- Empower staff or committees to address operational risk management
- Board to receive updates regularly
- Conduct audit of ongoing operational risks
- Implement policies and procedures
- Investigate and keep records on all claims
- Have insurance in place, review regularly to ensure sufficient limits and it covers risk
- Review all legal agreements to identify their risks then manage through waivers, risk assumptions, indemnifications
- Ensure third party contractors have sufficient and proper kinds of insurance
- Educate staff/volunteers about risk and how to avoid, prevent or remove it

Don't Get Overwhelmed!

- ✓ Create a timeline for developing your risk management practices
- ✓ Set realistic goals
- ✓ Break the process into manageable steps
- ✓ Don't attempt to do it all at once
- ✓ Set priorities. What needs to be addressed first?
- ✓ Involve other staff in this process
- ✓ Connect with other organizations that have already gone through this process to get support and recommendations

Risk Management Issues for Boards of Directors: Reducing Board Liability

- Where does control lie? With the board, a committee or executive staff?
- What are the lines of authority between the board and the executive staff?
- Does the board meet on a regular basis and do directors attend regularly?
- Are the financial statements completed independently?

Reducing Board Liability

- ✓ Examine whether any directors receive direct or indirect remuneration or other financial benefit from the nonprofit organization
- ✓ Has the nonprofit given authority to indemnify its directors and officers?
- ✓ Has the board authorized the organization to acquire Directors' and Officers' Liability Insurance?
- ✓ Has too much responsibility been delegated to executive staff, without careful and ongoing monitoring and review?
- ✓ Consider reducing the size of the board to limit the number of people who are exposed to liability as directors
- ✓ Make use of committees as an alternate to a large board of directors
- ✓ Consider the need to receive independent legal advice due to the possibility of liability exposure
- ✓ Consider implementing an advisory board to complement the board of directors without a corresponding exposure to liability
- ✓ Is there adequate communication of board responsibilities to existing, new and future board members?

Indemnification: To cover the cost of, or compensate the director for, any loss or damage sustained as a result of the acts or omissions of the director in their capacity as a director of the organization. It is an assumption of risk and costs by the nonprofit on behalf of directors when the directors are acting on behalf of the nonprofit. It is only valuable if the nonprofit has the financial resources to be able to fund the indemnification of directors (which must be established in the bylaws in order for the nonprofit to legally transfer funds).

Recommendations:

- Create and maintain a board binder of all corporate documents, with an explanation of the general operations of the corporation and the board of directors' legal duties and liabilities
- Provide regular updates on changes in the law to board members
- Has the board established a risk management committee?
- Is there a comprehensive due diligence review process by establishing and utilizing appropriate risk management checklists?
- Are the directors and officers aware of their fiduciary responsibilities at law in operating the nonprofit organization?
- Are the directors and officers exercising due diligence by remaining knowledgeable about its operations and ensuring its assets are properly protected?

Can You Afford It?

Before Selecting Insurance Consider:

- What is the degree of risk directors are exposed?
- Can the risk be reduced other than by insurance?
- What is the cost of insurance?
- What revenue is available to pay for insurance?
- Does the purchase of insurance advance the administration and management?
- Insurance should be considered the last line of defence in risk management

What is Insurance?

- Finances/pays for the cost consequences of risk
- Only a source of funds – not an investment fund
- Activates only *after* something has gone wrong
- The “wrong” must be “insured”
- Transfers the financial consequences of the “wrong”
- Transfer accepted by insurers in exchange for a periodic payment – the premium
- Insurance neither reduces the likelihood or size of losses

What Kinds of Insurance?

- **General Liability**
 - Sexual abuse and/or harassment
 - Non-owned auto, third-party use of property
 - Service of liquor, counselling, etc.
- **Directors’ & Officers’ Liability**
 - Employment Practices Liability
- **Property**
 - Business Interruption
 - Machinery Breakdown
 - Crime/Fidelity
- **Special Events**

Adequacy of Insurance Coverage?

- ✓ Require that your insurance agent/broker be advised in writing of all activities and risks of the nonprofit on an annual basis
- ✓ Discuss with the agent/broker your concerns of insuring the various risks your nonprofit
- ✓ Seek their advice and recommendations
- ✓ Request agent/broker respond in writing to the following questions:
 - What risks that have been identified are covered?
 - Who is covered under the policy?
 - What is the amount of the coverage?
 - What risks are not covered?
 - What additional insurance should be obtained?

Directors' & Officers' Liability Insurance

The D&O Insurance Policy

Provides personal financial protection for Directors' & Officers' against liabilities imposed while performing their duties. Protection is provided against Alleged Wrongful Acts described as:

“any error, misstatement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted, by an insured, individually or otherwise, in their insured capacity.”

Similar to General Liability, Nonprofit D&O covers liabilities except those specifically excluded (See Exclusions)

- Note: General Liability covers third party bodily injury and property damage only
- D&O Liability covers Wrongful Acts (“wrongful management decisions”), but excluding bodily injury and property damage

Policy Exclusions exist to:

- Eliminate uninsurable loss exposures:
Those not accidental, or predictable, within the control of the insured, catastrophic
- Manage moral and morale hazards
Intentional acts, Loss caused by undue care and attention
- Avoid coverage duplication:
Other insurance is available
- Eliminate coverage for extreme risks
Those requiring special treatment
- Keep premiums at a reasonable level
No policy can or will insure everything

D&O Common Exclusions

Liability arising out of:

- Bodily Injury and Property Damage
- Theft, Criminal acts, Deliberately fraudulent acts
- Pollution, Nuclear reaction or radiation
- Claims prior to the inception date of the policy

D&O Claims

Financial/Third Party:

- Misallocation of Funds, Breach of Fiduciary Responsibilities
- Self Dealing / Conflict of Interest
- Third Party Discrimination, Defamation, or Invasion of Privacy
- Failure to Maintain Insurance
- Interference with Contract, Breach of Contract
- Failure to Accredite or Certify
- Infringement of Trademark, Patent or Copyright

Employment Claims:

- Wrongful Termination, Breach of Employment Contract
- Discriminatory Hiring Practices, Failure to Promote
- Negligent Evaluation
- Failure to Grant Tenure
- Retaliation
- Wrongful Discipline, Sexual Harassment
- Invasion of Privacy, Employment Related Defamation
- Employment Related Infliction of Emotional Distress

D & O insurance is intended to:

- ✓ **Protect** the personal assets of individual directors or officers, where no indemnity is provided by the nonprofit's by-laws
- ✓ **Indemnify** the nonprofit for its own responsibilities under the by-laws to indemnify its directors and officers

Extend Coverage?

- To indemnify the corporation itself where it has responsibility apart from the directors and officers not all policies automatically cover the “entity”
- To protect directors or officers who serve at on other boards (outside D&O)
- To protect other employees that are sued for alleged wrongful acts in addition to the directors and officers and the entity

Claims-Made Insurance

- Coverage applies only where claims are brought against the director or officer during the policy period
- “Claims-made” refers to a demand made by a third party against an officer or director for moneys by virtue of a wrongful act
- Insurers require that the demand be an overt communication stating an intention by the third party to hold the director or officer liable
- Not necessary that a lawsuit be commenced
- Must be indication that another party intends to hold the directors and officers responsible for the consequences of some wrongful act

Buying any form of “claims-made” coverage or changing insurers:

- include "full prior acts" coverage or set the retroactive date as the inception date of your original policy.
- Knowledge of any "incidents" that may lead to a claim must be indicated on any application or renewal form by the applicant.
- If you note any such incidents on an application for a new carrier, ensure the "incidents" are reported to your current carrier.

Professional Liability

To be covered, the claims must arise from the insured’s position as an officer or director. A coverage problem could arise where the insured holds more than one position with the insured organization. For example, where the insured is both a member of the Board of Directors and the corporate solicitor, any claims associated with the latter position will be not be covered by the D&O policy, as they are the subject of professional liability insurance.

D&O Coverage

The policy should extend to all past and present directors, officers and committee members of the corporation.

Directors and officers insurance policies are issued on a “claims made basis.”

- This means that the nonprofit must notify the insurer before the termination of the policy period of any possible or potential claims that the directors and officers of the corporation may be aware of – if they want it defended by the insurer.

Provision that notice of cancellation be directed not only to the nonprofit, but also to the chair of the board of directors, which ensures that the board is notified of any intended cancellation of the policy.

Defence costs should be provided exclusive of the limit of liability.

If possible, the method of payment by the insurer should be described as “to pay on behalf of” (or similar statement – Advance of Payments) otherwise policies providing “indemnity” means the nonprofit will be required to fund the defense and make payment before the insurers will reimburse.

Limitations of General Liability

- Does not cover all liability risks
- Claims must be un-intended, un-expected event that cause bodily injury/property damage
- Pays only compensatory damages, not punitive or exemplary

Exclusions for:

- Sexual and/or physical abuse of children, Sexual harassment
- Penalties and fines
- Where the nonprofit
- Failed to advise changes in insurable risks
- Failed to advise prior claims

Limitations:

- on the geographic area
- who is covered
- on legal cost coverage

Employment Practices Liability Insurance

Protects the entity (corporation), its directors, officers and employees if a claim is brought for allegations of:

- Wrongful dismissal, discharge or termination of employment
- Employment related misrepresentation
- Violation of any employment laws, Wrongful discipline
- Sexual or workplace harassment of any kind
- Wrongful failure to employ or promote
- Discrimination due to a person's citizenship, dependence on alcohol or drugs, linguistic background, mental or physical disability, political belief or source of income, religious beliefs, country or nationality of origin
- Negligent evaluation, Wrongful deprivation of a career opportunity
- Employment related defamation, invasion of privacy
- Employment related wrongful infliction of emotional distress
- Breach of any oral or written employment contract or quasi-employment contract
- Failure to provide adequate workplace or employment policies or procedures
- Unfair or wrongful dealing, retaliatory treatment (whistleblower protection)
- Contagious diseases, reproductive hazards
- Workplace violence

Sources of Claims

- Refusal to employ a qualified applicant
- Failure to promote a qualified employee
- Demotion, evaluation, reassignment, or discipline of an employee, including constructive discharge
- Harassment, coercion, or unfair discrimination as a consequence of such things as race, color, nation of origin, creed, religion, gender and age
- Defamation of character
- Oral or written publication of material that slanders or libels an employee
- Violation or invasion of an employee's right to privacy

Beware!

- Failure to provide or update employee conduct manuals, signed by employees
- Layoffs, demotions and job transfers resulting from mergers and acquisitions
- Human resource managers not trained to handle employee complaints or claims
- Lack of discipline or lack of consistency when discipline applied
- Policies and employment procedures violated or applied arbitrarily

Preparation for Quote

- Present your nonprofit in the best light
- Share the expiring premium, limits, and deductible from your existing carrier
- Allow sufficient time for an underwriting review
- Fully complete the insurance company's application and attach all requested supporting information
- Make sure all directors and officers are questioned regarding any potential claims that they may have become aware of
- Misstatements on the application can void coverage if discovered upon the filing of a claim. Be accurate and truthful in answering questions on the application.
- Respond to the underwriter's questions (generally conveyed through your broker or agent) in a prompt fashion.
- Fully disclose your prior losses and provide detail on corrective action taken to avoid future losses.
- Request a sample copy of the complete policy.

Solutions

- Management training should be ongoing and current for all.
- Management has the duty to be aware of what is happening their organization

Failure to do so can lead to allegations that “management was aware of the situation yet they still did nothing.”

It's all about protecting the:

- ✓ Nonprofit Organization
- ✓ Its Board of Directors
- ✓ Its management, staff & volunteers

Other views:

- ✓ Creation and maintenance of a justified defense
- ✓ Just good governance