IS YOUR D&O READY FOR NEW RISKS BROUGHT BY COVID-19

Four steps to prepare and protect your Officers from emerging and increasing liabilities in the "new normal."

Volunteer leaders play a key role in many nonprofit associations. While elected officers and board members navigate a path for their own businesses and families through the COVID-19 crisis, they are also providing governance to associations during these difficult times. Being a director or officer has always come with obligations, however, the duties of care, loyalty, and obedience now encompass new risks and liabilities brought on by the pandemic.

During the early stage of the international health crisis the immediate concern for many associations was whether to proceed with spring conferences. For weeks event cancellation insurance was the topic de jour. Now it is clear there are a multitude of new and potential liabilities facing your Board of Directors and Officers.

Broadly speaking, nonprofit Directors and Officers insurance (D&O) is designed to protect the organization, its leadership, and the Board of Directors from claims alleging wrongful acts in the management of the organization. Plaintiffs can bring forth claims from a variety of theories including conflict of interests, negligence, the wasting of assets, fraudulent reports or financial statements, breach of contract, and even inefficient administration resulting in losses.

However, the realities of COVID-19 brings new questions and new risks, Does your current D&O address and cover everything you need it to in the COVID and post-COVID world? With new financial challenges, a changing work environment, and possible government funding issues, association executives must ensure nonprofit boards have the proper protections in place to address different and potential conflicts, evolving requirements, and increasingly complicated fiduciary responsibilities.

"We are only now beginning to see some of the potential fallout from COVID-19 especially as it pertains to liability flowing back to associations," says Derek Symer, Principal and Senior Vice President with AHT Insurance. "Right now, boards of directors are under incredible stress due to COVID-19 which makes organizational oversight and management decisions that much more difficult," Symer says.

These risks are already being addressed in the for-profit world, as InsuranceNewsNet reports "businesses may face myriad claims resulting from the pandemic, such as claims for breach of fiduciary duty relating to drops in stock price, or for their handling of business issues more generally during the pandemic."

Given the uncertainty and increasing liability exposures, associations can consider four steps to ensure their D&O insurance is appropriate for the new normal.

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IDENTIFY NEW RISKS

Especially now it is very important that associations and their boards continue to engage in a process of risk identification. While many may not have predicted the current COVID-19 outbreak, we can certainly start to see new risk patterns emerging:

Annual Conferences and Meetings

Many associations are making difficult and sometimes on-the-fly judgment calls as to when it will be safe to again host in-person meetings. These decisions could include tricky decisions involving whether or not to go forward with a major conference, or as we are seeing more often, a quick transition to an all-virtual conference environment. The traditional educational sessions and in-person meetings we are used to in the association world simply may not be feasible or appropriate for some time. This creates an opportunity for associations to experiment with more virtual offerings, something that could actually be more immersive and efficient. But with the possible upside there is also the potential for an association to lose critical revenue from these events. Equally problematic could be the technology risk associated with the new conference environment and the potential for 3rd party Employment Practices suits or Cyber Liability suits.

Remote Workforce and Office Reopenings

The “new normal” and rapidly deployed remote workforce has created a host of cybersecurity and liability concerns for associations. Concerns about network security, breaches, and fraud presents a sudden risk to many associations. AHT’s Symer recently wrote on this topic for the American Society of Association Executives, explaining the heightened cyber risks and the steps associations can take to mitigate these risks. Symer reports that some cyber insurers have seen as much as a 5x increase in funds transfer fraud and social engineering claims filed by policyholders in the past few weeks alone. Reported losses have ranged anywhere from $25,000 to $1.3 million with bad actors exploiting the perfect storm of COVID -19 and rapidly changing operating environments.

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Office Reopening and Staffing Decisions

Reopening offices, calibrating the headcount, and decisions to bring employees back into the office environment can pose numerous challenges. With budgets shrinking and finances tightening, associations may be forced into difficult personnel and budgetary decisions that could result in a Reduction in Force or layoffs, which again heighten Employment Practices liability concerns. Related liabilities may exist concerning the decision of when and how to bring people back into the normal office environment. A decision, either way, could trigger coverage, specifically wrongful termination allegations. It is somewhat easy to foresee claims arising from allegations of unsafe working conditions, lack of proper industrial hygiene protocols, or employees contracting COVID-19 in the workplace. With this uneasy stew of circumstances, it is expected that Employment Practices claims will rise in the foreseeable future.

Payroll Protection Program

Another area of potential concern revolves around the CARES Act and the Payroll Protection Program (PPP). Many organizations are concerned about the potential liability associated with accepting loans from the federal government which could expose their organization to False Claims Act violations. A governmental investigation or whistleblower complaint could put an organization in a position where it needs to expend significant money to defend itself against these allegations and prove that it acted responsibly.

EVALUATE CURRENT POLICY

Nonprofits and associations need to be aware of what provisions in their current insurance programs provide protection and what exclusionary language could cause problems down the road. As staff leadership evaluate and present insurance options, considerations should be made to new and evolving areas of risk presented by COVID-19 circumstances.

In reviewing an insurer's D&O policy recently, Symer observed that a clear False Act Claims exclusion could be problematic for many insureds receiving PPP funds. "In general, we want to see language that protects boards and directors and has reasonable language in the event of a governmental investigation," Symer says. "It's always a good idea to review exclusions in D&O policies, and a False Claims Act exclusion is certainly one that stands out as concerning in this environment."

EDUCATE & COMMUNICATE WITH YOUR BOARD

Increasingly we expect to see underwriters at D&O insurers paying greater scrutiny to the board oversight of nonprofits and associations. For renewals insurers will want to see that their D&O clients are financially strong, able to withstand difficult circumstances like COVID-19, and have a plan for the months and years ahead. Similarly, insurers will look to ensure that boards are adapting to the adverse circumstances and taking the right emergency measures. These could include changing the pace of meetings, adopting ad hoc emergency committees to deal with COVID-19, and enacting continuity plans to address the potential for illness to befall key leaders.

MANAGE COSTS

Prior to COVID-19, D&O premiums were already entering a hardening market with a number of commentators predicting that premiums could be disproportionately high. There is certainly concern this may be bearing out. Some D&O underwriters might be looking to cut limits, tighten terms, increase retention, and look for additional premium. In other cases, accounts will face greater scrutiny depending on the type of work they do. There is concern about rehiring strategies and possible employment lawsuits resulting from how those decisions are made and justified. Accounts in solid financial footing at the end of 2019 will weather the storm better than those in financial distress.

To help enable your Board of Directors and Officers to be the leaders you need them to be during a crisis, evaluate new risks, review your current policy, and manage the cost of D&O insurance when possible. Along with effective communication and situational awareness, you will best prepare your board, and your association, to address and withstand the clear and present risks being brought by the COVID-19 pandemic.