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BUSINESS

Tail insurance: Who pays and when do you need it?

■ A column examining the ins and outs of contract issues

By STEVEN M. HARRIS ([HTTP://WWW.AMEDNEWS.COM/APPS/PBCS.DLL/PERSONALIA?ID=SHARRIS](http://www.amednews.com/apps/pbcs.dll/personalia?id=sharris)) — Posted March 5, 2007.

Now is the time to dust off those physician employment agreements and professional liability insurance policies, or if you are about to finish residency, now is the time to start thinking about how to negotiate an effective tail insurance provision. This means paying special attention to whether your professional liability insurance policy provides for claims-made or occurrence-based coverage, and if it's the former, who is responsible for buying tail coverage.

Tail insurance issues arise whenever a physician leaves a practice, whether due to a change of job, change of location, retirement, separation, or the buy-out of a physician-shareholder from a practice. Many practices are now subtracting the cost of tail coverage from separation pay, deferred compensation and/or the redemption price of an ownership interest to which a shareholder would be entitled when departing a practice.

Insurance coverage is seamless when a physician leaves a practice covered by occurrence-based professional liability insurance. Professional negligence will be covered by the insurance carrier at the time of the alleged event, even if the physician has a different carrier at the time the claim is filed.

Insurance coverage may not be seamless if a physician leaves a practice covered by claims-made professional liability insurance. Instead, tail or similar coverage is required. Claims-made coverage protects a physician for professional negligence as long as a two-part test is met: first, the claim must have arisen while the physician was practicing medicine on behalf of the practice; and second, the physician must be notified that the claim is pending while the physician is still engaged on behalf of that practice. If either of these tests is not met, the current claims-made insurance policy will not provide coverage.

Therefore, if claims-made insurance is the benefit you have received in your physician employment agreement, you must recognize that tail coverage will be necessary if you leave the practice and acquire a new insurance carrier in your new practice setting.

The next crucial question is who should pay for the tail coverage. There are several options available to deal with the payment of tail coverage. First, the cost of tail coverage can be attributed 100% to either party. In specialties where recruitment of new physicians is a problem, these employers may be more likely to pay a substantial portion, if not all, of the cost as a benefit or inducement.

If paying for coverage yourself, you might consider spreading out your payments. You may also consider timing your move so that you leave at the beginning of a year.

Physicians who switch professional liability carriers at the end of the year have already paid their premiums for that year, and then immediately must come up with another, sometimes significantly higher amount to cover the tail insurance.

A second option is to connect the payment of tail coverage to the manner in which the employment is terminated. By way of example, if a physician's employment is terminated by the practice without cause or if the physician terminates the agreement for cause, the practice is required to pay the tail. If the physician's employment is terminated by the practice for cause or by the physician without cause, the physician is required to pay the tail. Some practices require the physician to pay for tail coverage if the physician violates his or her restrictive covenant.

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Another option is to split the cost of tail based on some percentage between the practice and the physician, or to include a phase-in of the payment of the tail by the practice so that the practice pays one-third of the tail if employment ends in the second year and all of the tail if it ends in the third year or later.

A final thing to keep in mind is that if a physician leaves the practice for another practice within the same state and stays insured by the same insurance carrier, then the carrier will provide continuous insurance coverage for the physician without the need for a tail.

Contract drafting is especially important in this area, so the departing physician has the choice of continuing coverage or purchasing a tail.

Reviewing your policy

Once you have a sufficient tail coverage provision for your physician employment agreement, it's time to consider whether you have the right professional liability insurance policy. You should review your current or prospective professional liability insurance policy, paying special attention to the following:

- Whether the policy is claims-made or occurrence-made.
- How loss is defined. "Pure loss" coverage is only for the amount awarded to the plaintiff, whereas "ultimate net loss" covers attorney's fees and costs as well.
- The "duty to defend" provision. Will you be reimbursed for lost wages when in court? What services will be provided as part of your defense?
- Any notice provisions to determine when and how you must report a liability claim to the carrier in order to still be eligible for full coverage.
- The coverage and exclusion provisions. Does the policy cover claims of unprofessional conduct made to bodies such as state licensing boards or only claims of professional negligence? Does it cover punitive damages, intentional misconduct or contractual indemnity claims?
- The "consent to settle" provision to determine the terms under which a settlement might be agreed upon by the insurer and physician. If you refuse to consent for a settlement, are you responsible for ongoing defense costs and the amount of any verdict that exceeds the amount of the recommended settlement?

It also is important to review your insurance application to ensure it does not contain any false or missing information that may be deemed "material information" by the underwriting department. The failure to list a prior disciplinary action or a prior medical liability lawsuit may give the insurance company the opportunity to disclaim coverage. You should err on the side of full disclosure.

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