

# Insurance for Plans and Trustees

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# Introduction

- It is important to understand the various types of insurance available for Plans and Trustees.  
Today we'll cover:
  - Overview of fiduciary liability, fidelity bonds and other types of insurance
  - Do you have enough coverage?
  - Understanding the timing of claims
  - Benefit overpayment protection
  - What other benefits does your policy offer?

# Anatomy of Insurance Policies

- **Declarations Page**
  - Sets forth key information such as effective date, coverages, limits, sub-limits, and insureds
- **Insuring Agreement/Main Form**
  - Body of insurance policy describing coverages, definitions
  - Definitions can be very important in understanding coverage
- **Endorsements**
  - Term used to describe amendments/changes to the terms in the Insuring Agreement
  - Many important terms are found in endorsements
  - Need to review all endorsements to understand a policy

# Anatomy of Insurance Policies

- **Exclusions**
  - Each policy will include a list of exclusions
  - Exclusions are also a key factor in understanding a policy
- **Limitations and Conditions**
  - There are often carved out sub-limits to coverages
  - Understand the reporting process for losses
  - When a policy may be cancelled or non-renewed

# Anatomy of Insurance Policies

- Consider and understand the difference between:
  - **First-party coverage**
  - **Third-party coverage**
- We will be discussing this as we review different types of insurance coverage

# Anatomy of Insurance Policies

- **First-party coverage**

- The first party = Insured
- Provides compensation to or on behalf of the Insured even though a claim has not been made against the Plan or other Insured
- All other coverages must be triggered by a claim

- **Third-party coverage**

- Coverage is triggered by a third party bringing a claim against an Insured alleging a wrongdoing that caused damages
- Provides compensation to or on behalf of the Insured to respond to a claim made against the Plan or other Insured

# Overview of Fiduciary Liability Insurance

# Fiduciary and Settlor Roles

- Boards of trustees are usually the “Named Fiduciary” of multiemployer plans
- Trustees also have fiduciary duties in their individual capacity
- Boards of trustees are the “Plan Sponsor” of multiemployer plans and therefore have “Settlor” responsibilities
- Fiduciary liability insurance offers coverage for claims that these types of duties and responsibilities were breached



# Fiduciary and Settlor Roles

## **ERISA Section 404 fiduciary duties**

- Acting solely in the interest of the participants and beneficiaries
- For the exclusive purpose of:
  - Providing benefits to participants and beneficiaries
  - Defraying reasonable expenses of administering the plan
- Prudent-person standard
- Diversify investments
- Following governing plan documents

# Fiduciary and Settlor Roles

- **Settlor Functions**

- Examples of settlor functions include:

- Choosing, changing terminating or eliminating provisions of a Trust or Plan,
    - Amending benefits,
    - Requiring employee contributions, or changing the level of employee contributions,
    - Merging or consolidating with another trust or plan,
    - Funding decisions.

# Fiduciary Liability Insurance Coverages

*Note that key terms will be defined in the policy*

- Breach of the responsibilities, obligations or duties imposed upon **Insureds** by an **Employee Benefit Law**
  - ERISA and the Internal Revenue Code primary federal laws
- Negligent act, error or omission by any **Insured** in the **Administration** of any **Plan**

# Fiduciary Liability Insurance Exclusions

- Check all exclusions and sub-limits
  - i.e., 502(a)3/equitable relief sub-limits
- Fines, taxes and penalties
  - Most policies exclude fines, taxes and penalties with some givebacks
  - Every policy is different, so compare
    - Full limits or sub-limits
  - Some fines taxes and penalties brought by agencies are more common than others
  - Blanket coverage

# Fiduciary Liability Policy Considerations

- Your Fiduciary Policy should **not** have a deductible
  - Check main policy and individual coverages added by endorsement
- Who is defined as an Insured?
  - Are past, present and future trustees and employees included?
  - Are there individuals or organizations listed as named insureds that shouldn't be covered by your policy?
  - Are employer or union officials providing services for the plan that should be covered?

# Fiduciary Liability Policy Considerations

- Third-party coverage
  - Triggered by a Claim brought by Third Party alleging breach of fiduciary duty or negligence in plan administration that caused claimed harm
  - Coverage typically includes defense costs and liability to third party if claim is successful or matter settled
- Choice of counsel
  - Choice, panel or appointed?

# Fiduciary Liability Policy Considerations

- First-party coverages
  - Investigatory/pre-claim/interview coverage
    - Review limitations to governmental agencies; some limit to DOL and PBGC
  - Voluntary compliance (VCP)
    - Reinstatement of limits?
    - Will this coverage extend to expenses?

# Waiver/Elimination of Recourse

- Plan trustees are Insureds under a fiduciary liability policy
- Each trustee has personal fiduciary duties
- If there is a finding that an individual trustee breached fiduciary duties, then an insurance carrier has the right to seek reimbursement of costs paid on behalf of a breaching fiduciary
- *“Waiver of recourse” allows trustees to pay a fee in exchange for an insurance carrier’s waiver of that right. Carrier agrees that it will not seek recovery from an individual trustee in a personal capacity.*
- This fee cannot be paid for by a Fund; can be paid for by an employer or union on behalf of a trustee or by a trustee personally



# Fiduciary Claims

# Fiduciary Liability Claims— Frequency and Severity

**Frequency:**  
Most  
Common

- Benefit claims
- Benefit overpayments
- Investigatory expense or pre-claim

**Severity:**  
High  
Dollar

- Breach of fiduciary duty
  - Prohibited transactions
  - Imprudent investments
  - Other ERISA violations
- Class action claims

# Benefit Overpayment Protection

# Benefit Overpayment Coverage

- **What is a benefit overpayment?**
  - Many reasons benefits can inadvertently be overpaid
    - Benefit calculation error
    - Deceased participant/plan not notified
    - Error in work reporting
  - Trustees have responsibility to oversee proper benefit payments and to determine what to do if there is a benefit overpayment, including considering whether to seek recoupment
  - Sometimes benefits are overpaid due to wrongdoing by participants
    - Fraud/misrepresentation/incorrect information
    - Returning to work and not notifying fund office/suspension of benefits rules

# Benefit Overpayment Coverage

- **Standard changed by SECURE 2.0 in 2022**
  - Confirmed that decision whether to pursue collection on overpayments is a fiduciary act
  - Gave fiduciaries broad discretion to decide not to recoup on inadvertent overpayments given relevant circumstances
  - Imposed significant protections for participants who were inadvertently overpaid
    - Exceptions for “culpable” participants
  - Imposed limits on how a plan may recoup overpayments
  - Created standards for when a plan must be made whole

# Benefit Overpayment Coverage

- How will a fiduciary policy respond?
  - Third-party coverage
    - Coverage provided under Wrongful Act if a claim is brought against the insured; counterclaim in response to lawsuit
  - First-party coverage
    - How is coverage triggered?
    - Is the coverage limited in any way?
      - Typically, sub-limited and there can be no claim against the insured
      - Look at coverage triggers

# **ERISA Fidelity Bond/ Crime Policies**

## Crime Policies/ERISA Fidelity Bonds

- ERISA requires that plans have a “fidelity bond” to protect against theft of plan assets by insiders
  - Maximum required coverage is \$500,000
  - Cannot have a deductible for employee theft
  - Typically referred to as employee dishonesty policy or bond
  - Coverage can be provided through a crime policy



## Other Coverages in Crime Policies/ERISA Fidelity Bonds

- Carriers are offering additional coverages under the same policy for certain cyber breaches such as:
  - Computer fraud
  - Funds transfer fraud
  - Social engineering fraud
  - Forgery or alteration fraud.
- Deductibles allowed for additional coverages
- *Often have low sub-limits*
- First-party coverage
  - Does not require a third-party claim; covers loss to insured
  - These policies typically do not offer third party coverage

# Other Types of Insurance

## Multiemployer Plans Use Electronic Media and Are Exposed to Risk

- Use computers to store information, manage plan investments, manage benefit claim administration, facilitate communications
- Hold participants' personal and identifying information
- Hold significant assets at different types of financial institutions
- Engage professional service providers
- Multiemployer plans are independent of contributing employers and participants' unions

# Cyber Insurance

- Cyber insurance policies help plans to:
  - Manage and transfer risks
  - Protect plan and personal assets.
- Provides an array of services
  - Negotiated partnerships with privacy counsel and incident response vendors
  - Risk management tool
  - Hotline to call when breach occurs
- Cyber breaches may be governed by state, not federal law (HIPAA for health plans is federal law)

# First-Party and Third-Party Coverages

- Cyber policies offer coverage for distinct types of potential costs as a result of a cyber event
  - **First-Party:** Expenses that a Plan incurs in responding to a cyber event regardless of circumstances
  - **Third-Party:** Expenses that a Plan incurs in responding to claims by or actions of outside parties relating to a cyber event
- Insured's *fault or responsibility* is not a key factor; the focus is on costs brought about because of a cyber event

## If a Cyber Security Breach Affects a Multiemployer Plan:

- A Plan, through its Trustees, may have independent legal obligations to respond to a breach, including notification
- A Plan's operation may be interrupted
- A Plan may suffer a loss of assets
- A Plan's participants' personal information may be compromised
- A Plan, and its Trustees, may be subject to lawsuits or governmental investigations relating to a breach
- A Plan may need to manage publicity relating to a breach.

# Plan Service Providers' Cyber Policies

- Multiemployer plans are independent legal entities with independent legal responsibilities
- Plans and their trustees can be sued in their own capacity
- While plans rely heavily on their service providers, plans are independent of them
- Service providers' policies provide coverage for the providers' functions, assets, equipment, responsibilities

# Plan Service Providers' Cyber Policies

- Service providers' policies will likely not cover all of their clients' potential costs, such as defense expenses if there is a third-party claim or lawsuit
- Service providers will not be able to obtain enough coverage to cover all of their clients' potential losses
- Service providers are obtaining cyber insurance in the same marketplace; limits on available insurance, coverages



## Additional Coverage for Cyber Risks; Excess Coverage

- Given limitations in cyber policies and crime bonds, some carriers are offering separate policies or endorsements for specific cyber risks, such as social engineering
- Explore excess liability cyber policies
  - Stack or tower policies to address gaps in coverage
  - Make sure there is “drop-down” coverage for specific types of events

# Directors and Officers Policy (D&O)

- Coverages include:
  - Employment practices liability/3<sup>rd</sup> party discrimination and harassment liability
  - Personal injury
  - Educator's liability
- Considerations: Training funds and self-administered plans
  - Does your plan have employees?
  - Does your plan provide services, such as training?

# Commercial Lines

- Considerations
  - Does your plan own property?
    - Buildings, heavy equipment, or automobiles
  - Does your plan have employees?

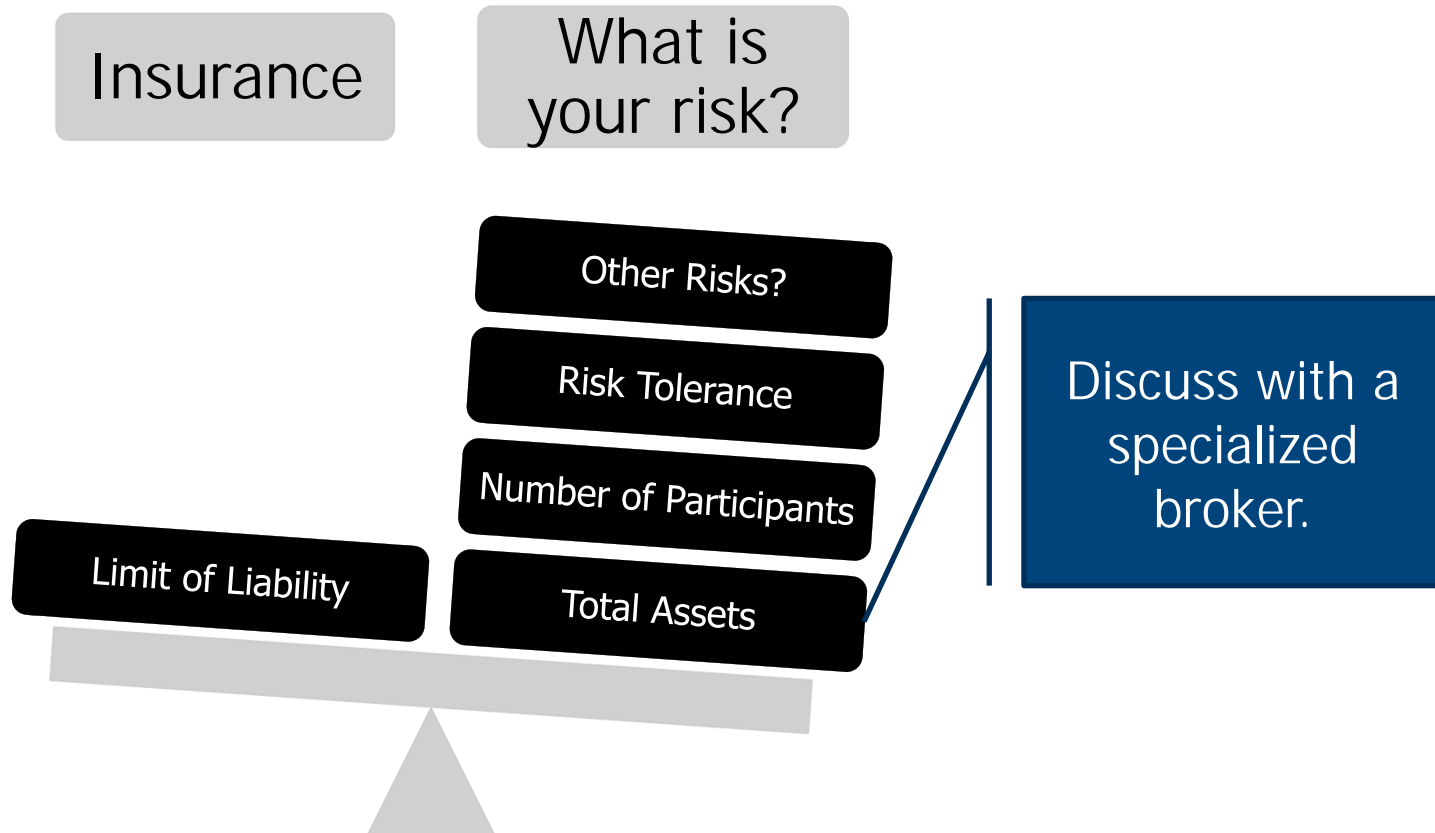
# Commercial Lines

- Coverages
  - Workers' compensation
  - Property
  - Auto insurance
  - General liability
  - Inland marine (equipment)
  - Student premises liability, JATC accident



**Do You Have Enough Coverage?**

# Considerations for Determining Amount of Coverage



# Understanding the Timing for Claims

# Coverage Is on a “Claims Made” Basis

- A “claim” is the trigger to coverage.  
(Not the occurrence of the alleged wrongful act.)
- The “claim” must be made against the insured during the policy period.
- What is a claim?
  - A written demand for relief (money or other)
  - A written request to toll statute of limitations.
  - Proceedings: Arbitration or court
  - Administrative charges



# Insured Reporting Obligation to Insurer

- Insured must report “claims,” usually as soon as practicable.
- Check for reporting window.
- Insured usually has the option to report circumstances/potential claims that have not yet resulted in a claim.
- Terms of policy on claims submission must be followed, otherwise coverage may be denied.

## Extended Reporting Period

- Carriers typically allow for you to purchase an extended reporting period/tail coverage for “claims-made” policies
  - Time period can vary by carrier and state requirements
- Policies may contain an automatic reporting window after the policy expires



# **What Other Benefits Does Your Policy Offer?**

## Other Benefits



Risk management  
services



Negotiated  
partnerships with  
specialists

# Key Takeaways

- Insurance Policies offer coverage for different types of risks and different types of losses
- It is important to understand how insurance policies work and the types of risks or losses that are and are not covered
- It is important to work with an insurance broker that understands your risk
- Make sure you work with a knowledgeable professional that can work with you to compare policy language

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