Insuring Your Apprenticeship Fund

by | **Laverne Wingfield** and **Tina Fletcher**

As providers of benefits and training to apprentices, joint apprenticeship training committees (JATCs) and joint apprenticeship training funds (JATFs) have specific insurance needs that should be reviewed.

Joint apprenticeship training committees (JATCs) and joint apprenticeship training funds (JATFs) play an important role in producing highly skilled and safe workers. Because they both train and provide benefits to apprentices, their insurance needs are different from those of pension and health and welfare funds.

JATCs are typically the entity that runs the apprenticeship program or school. *JATFs* are the related funds that hold the assets of the program and are governed by the Employee Retirement Income Security Act (ERISA). Because JATFs are ERISA funds, trustees have fiduciary liability exposures. Schools operated by JATCs also have operational exposures such as hiring, firing and admittance of students. This article details the types of insurance coverage JATC leaders and trustees should review with their insurance representatives to ensure the correct coverage is in place.

JATCs should review these five areas of insurance coverage:

1. Fiduciary liability
2. Directors and officers (D&O) liability
3. Cyberliability
4. ERISA (fidelity) bonds
5. Other coverage such as commercial insurance and student accident policies.

Fiduciary Liability

JATF trustees, like other multiemployer fund trustees, have the duty to be prudent and act in the best interest of participants. Funds are not legally required to purchase a fiduciary "errors and omissions" insurance policy, but this is the most important line of defense in protecting trustees from personal liability. Funds should review policy limits to ensure they have enough protection to cover the personal liability of trustees as well as plan assets.

If trustees or plan sponsors also act as settlors, some insurance carriers specifically extend defense and indemnity coverage for those duties. Settlor responsibilities include amending plan documents, choosing the type of plan or options in the plan, changing or eliminating plan options, requiring employee contributions or changing the level of contributions, and terminating a plan or part of a plan.[1]

Types of fiduciary liability insurance coverage available are:

- *Indemnity:* covers claims of losses or damages caused by the JATC[2]
- *Defense cost:* covers reasonable and necessary fees and expenses incurred in the investigation, defense, settlement and appeal of a claim, including legal expenses
- *First-party:* covers payments to or on behalf of the JATF for its own losses without a lawsuit filing
- *Third-party:* covers defense and potentially indemnity after a covered claim occurs against the JATF, and there is some form of negligence.

Fiduciary policies provide the following types of first-party coverage.

Preclaim Coverage

Funds should consider coverage for the expenses associated with preparing for an audit or investigation *(preclaim costs)* by a government agency such as the Department of Labor (DOL). Without this coverage, the plan is responsible for all such costs unless there is a finding of wrongdoing, which triggers a claim.

This coverage pays for legal fees in order to allow plans to engage legal representation from the beginning in an effort to resolve issues and potentially prevent a claim. Carriers may refer to this coverage as *investigatory expense, preclaim, gap* or *interview coverage.* Some carriers limit coverage to costs associated with preparing for investigations by DOL and the Pension Benefit Guaranty Corporation (PBGC). Funds should review policy terms with their insurance representative so they have a clear understanding of coverage limits.

Voluntary Compliance

The Internal Revenue Service (IRS) and DOL both have programs that allow funds to submit corrections in order to help avoid future liabilities during an audit and preserve tax-favored status for the plan.[3] For example, a fund may want to report a correction to IRS if it finds the JATF never filed an IRS Form 990. Carriers not only cover any fines or penalties associated with the correction but also extend coverage to pay for the filing fee and legal expenses.

Voluntary compliance coverage is typically *sub-limited,* which means there is a maximum amount that the carrier will pay for this type of first-party coverage under the umbrella of the policy's full aggregate limit.

Fiduciary policies were originally designed to cover third-party claims in which the fund or trustee is being sued for negligence. These types of claims can arise out of breaches of fiduciary duty, settlor functions and/or plan administration.

Fiduciary liability policies should contain the following third-party coverage.

Trustee Expenses

This coverage pays the defense costs for an individual trustee in addition to the coverage already provided for the plan. Most carriers limit this coverage to a maximum of $2 million.

Elimination of Recourse

ERISA expressly allows a plan to purchase fiduciary insurance, so long as the insurer may pursue recourse against an errant fiduciary in the case of a fiduciary breach. Trustees, the employer (or employer association) or employee organization (union), however, can purchase an elimination of recourse rider that prevents insurance carriers from pursuing trustees individually. A rider generally costs $25 per trustee and cannot be paid for with plan assets.

ERISA Section 502(a)(3) Surcharges

ERISA Section 502 permits plaintiffs to recover "appropriate equitable relief" to remedy violations of statutory benefit rights if there is no remedy under ERISA Section 502(a)(1)(B).[4] *CIGNA Corp. v. Amara* determined that when a fiduciary breaches his or her duty, he or she may be responsible to pay money or compensate the trust or its beneficiaries. Surcharges are a remedy for not providing accurate and comprehensive details to participants of a plan in this case.[5] Surcharges are the responsibility of the fiduciary, so it's important to make sure a policy extends to this type of risk.

Fines, Penalties and Taxes

Fines, penalties and taxes are typically excluded under the fiduciary policy, but many carriers provide an extension for specific fines and penalties, such as:

- Civil penalties or excise tax imposed pursuant to ERISA Section 502(c) or pursuant to any other provision of ERISA or the Internal Revenue Code that was amended by the multiemployer plan provisions of the Pension Protection Act of 2006 (PPA). Most carriers provide a sub-limit of coverage for these types of penalties, usually up to $250,000.
- Civil penalties of up to 5% of the amount involved in a prohibited transaction imposed pursuant to ERISA Section 502(i). Fiduciary carriers typically provide coverage up to the limit of liability for the 5% penalty amount and coverage is not typically sub-limited. If the prohibited transaction is not corrected, the penalty can become 100% of the "amount involved," which is not typically covered by carriers, so it is important to correct the prohibited transaction.[6]
- Civil penalties imposed pursuant to ERISA Section 502(l)(1) for breaches of fiduciary duty. Typically, these penalties are 20% of the applicable recovery amount of the breach but can be reduced if the fiduciary acted reasonably and in good faith. It is reasonable to expect that the fiduciary will not be able to restore all losses to the plan, and the penalty may be reduced by the amount of any penalty or tax imposed under Section 4975 of Title 26 of ERISA.[7] Fiduciary carriers typically provide coverage up to the limit of liability for the 20% penalty amount, and coverage is not typically sub-limited.
- Civil fines and penalties imposed pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Health Information Technology for Economic and Clinical Health Act (HITECH Act) or the Patient Protection and Affordable Care Act of 2010 (ACA). Most carriers sub-limit to $1.5 million for JATFs.
- With respect to a judgment otherwise covered under a fiduciary policy, excise tax penalties of up to 15% of the amount involved in a prohibited transaction imposed pursuant to Section 4975 of the Internal Reve-

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nue Code, or excise tax penalties imposed pursuant to Section 4976 of the Code. This coverage should be reviewed with the insurance representative. Some carriers may sub-limit this coverage, while others provide full limits.
- Section 203 of the Bipartisan Budget Act of 2013 (H.J.Res.59)[8] involves fines and penalties for improperly using information provided via the Social Security Death Master List. Most carriers provide a sub-limit of coverage for these types of penalties, usually up to $250,000.

Regulatory bodies continue to impose new penalties, so funds should look for a carrier that provides a sublimit for blanket "fines and penalties" coverage. Other policy features to examine include final and nonappealable adjudication requirements, choice of counsel and duty to defend. Nonappealable adjudication language means that the policy must cover the insured party through the highest level of appeal. A choice-of-counsel feature means that JATFs may work with attorneys who already understand the plans and their trustees. Many insurance carriers require insured funds to choose counsel from their lists of preapproved firms. A duty-to- defend provision designates that the insurance carrier must step in to defend its insured funds from the beginning of covered claims.

The most common fiduciary claims arise out of governmental agency audits, which can trigger claims for excessive expenditures, expenses that do not benefit the participant, failure to produce requested documentation (such as the 5500 exemption form) and prohibited transactions.[9]

JATFs should make certain their fiduciary policies extend to past, present and future trustees. This policy will continue to extend coverage for past trustees even after they have moved on from the fund. JATFs also should look for carriers that provide complimentary risk management services, which can be invaluable in creating policies and procedures.

takeaways

- Because they both train and provide benefits to apprentices, the insurance needs of joint apprenticeship training committees (JATCs) and joint apprenticeship training funds (JATFs) are different from those of pension and health and welfare funds.
- JATFs are Employee Retirement Income Security Act (ERISA) funds, so trustees have fiduciary liability exposures. Schools operated by JATCs also have operational exposures such as hiring, firing and admittance of students.
- Types of fiduciary liability coverage available for JATFs are indemnity, defense costs, first-party coverage and third-party coverage.
- Directors and officers (D&O) liability policies provide coverage to training committees and leaders for claims such as discrimination.
- Cyberliability coverage is important because funds have access to and store students' personal information.
- Fidelity (ERISA) bonds protect plan assets from theft.

Fiduciary liability insurance might be used in these examples:
- DOL fines a JATF after a routine audit determines that the fund supplied alcohol for its program graduates at a graduation dinner, violating DOL guidelines.
- A training fund is delinquent in filing its Form 990 and must pay penalties.

D&O and Wrongful Employment Practices Coverage, Including Failure to Educate

D&O policies provide coverage to training committees and leaders against common operational exposures, such as discrimination claims brought by candidates who are denied acceptance. These policies allow leaders and instructors to confidently perform their duties without worrying about personal exposure.

A D&O policy protects the fund and committee in addition to protecting individuals, including past, present and future directors, trustees, officers, employees, board members and committee members. The policy can be extended to individuals designated by and serving the entity, such as contracted employees.

D&O policies typically cover errors, omissions or breaches of duty that have been committed or alleged to have been committed by the entity or any insured person in the discharge of his or her duties. The scope of coverage includes employment practices, such as third-party discrimination and personal injury coverage. Charges brought by the Equal Employment Opportunity-Commission (EEOC), National Labor Relations Board (NLRB) and similar bodies can be considered claims. An important endorsement on this policy is *educator's liability,* which covers the risk that JATCs face when their graduates use the education they acquired in the workforce.

D&O insurance might be used in these examples:

- A female applicant files a lawsuit claiming a JATC did not admit her into the program because of her gender.
- JATC graduates make mistakes during a construction job that delay the project. The general contractor loses subsequent business opportunities from the project developer and files a lawsuit against the JATC alleging that it failed to properly educate its graduates.

These types of claims are typically not covered under a fiduciary policy because such policies do not extend to harassment, discrimination, failure to educate or personal injury, including copyright infringement claims. With recent EEOC updates prohibiting discrimination based on disability, age, sexual orientation and genetic information,[10] apprentice programs are more at risk than ever before for decisions relating to admission of candidates. JATCs should have an insurance policy that extends to negligence arising out of such allegations from EEOC or individual candidates.

Cyberliability

JATCs have access to and possession of their students' personal information such as Social Security numbers and demographics. If this data is lost or exposed, most states require the entity to respond in a timely manner by notifying potentially affected individuals, regulators and the media.

A cyberliability policy includes coverage for losses such as:

- Breach notification costs
- System damage
- Regulatory actions
- Cyberthreats and extortion
- Payment card industry fines
- Credit monitoring expenses
- Lawsuits due to breach of security.

Cyblerliability insurance might be used in these examples:

- An administrator for a large training fund loses his laptop while traveling for an educational conference. The hard drive of the laptop has fund participant records. Although there is no evidence that anyone has accessed the records, the fund must treat the loss of data as a breach and notify affected individuals and regulators.
- A group hacks into a JATF system through its firewall to access fund participant data that include names, Social Security numbers and home addresses.

A standalone cyberpolicy is important to consider because it is a form of risk management for the fund. A carrier's contracted breach team will help the fund respond and walk it through the steps that are necessary in responding to breaches of personal identifiable information (PII). *PII* is generally defined as information that can be used on its own or with other information to identify, contact or locate a single person or to identify an individual.

For more information about cyberliability insurance coverage, trustees should review *Cybersecurity Considerations for Benefit Plans,* a 2016 report issued by the ERISA Advisory Council on Employee Welfare and Pension Benefit Plans.[11]

Fidelity (ERISA) Bonds

Under ERISA, plans must have fidelity bonds to protect plan assets from theft. A fund might make a claim if a fund employee stole fund assets. Bonds must meet these requirements:

- The limits must equal 10% of plan assets.
- The minimum bond amount is $1,000, and the maximum bond amount is $500,000.

Plans should consider an inflation guard for limits less than $500,000 so the limit increases if the assets increase over the period of the bond, which is typically three years. Deductibles are not allowed under standard employee theft coverage. Deductibles can apply to additional coverage a fund may purchase from its bond carrier such as for third-party forgery.

It's important to discuss this coverage with the fund insurance representative to determine if the $500,000 maximum requirement under ERISA is sufficient for the JATF.

Other Coverage

JATCs should consider these other important types of coverage.

Commercial

This extends coverage for bodily injury and property damage. It typically excludes professional liability and contingent bodily injury and property damage that arises out of instruction. JATCs may have additional exposures such as equipment and pollutants that require additional types of coverage over and above the standard commercial policy.

Participant Accident Insurance

This provides a limited amount of coverage for an injured volunteer or participant on a no-fault basis. This provides peace of mind for funds because workers' compensation laws can be complicated and the coverage may not apply to students in many states. A general liability policy may not pay claims unless fault is established. In many cases, these policies also include a death benefit for participants.

Every JATC and JATF is different, and it's important for training directors, administrators and trustees to review new insurance coverage and current claims examples with their insurance representatives annually. JATCs and JATFs should seek insurance providers that update coverage regularly with evolving industry trends, employ specialized claims managers and provide risk management services.

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Endnotes

1. See www.hgexperts.com/article.asp?id=5138.
2. See www.investopedia.com/terms/i/indemnity.asp.
3. See www.irs.gov/retirement-plans/voluntary-correction-program-general-description.
4. See www.williamsmullen.com/news/court-holds-erisa-plaintiff-cannot-claim-equitable-remedies-when-plaintiff-has-adequate-remedies.
5. *CIGNA Corp. v. Amara,* 131 S.Ct. 1866 (U.S. 2011). See www.law.cornell.edu/supct/html/09-804.ZS.html.
6. See www.law.cornell.edu/cfr/text/29/2560.502i-1.
7. See www.law.cornell.edu/uscode/text/29/1132.
8. See www.congress.gov/bill/113th-congress/house-joint-resolution/59.
9. DOL has several resources including its *Field Assistance Bulletin* from April 2, 2012: www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2012-01.
10. There is a time line for implementation of the new rules, and more information is available at www.doleta.gov/oa/eeo/pdf/Implementation_Timeline.pdf and www.doleta.gov/oa/eeo/.
11. Advisory Council on Employee Welfare and Pension Benefit Plans, *Cybersecurity Considerations for Benefit Plans.* Available at www.dol.gov/sites/default/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2016-cybersecurity-considerations-for-benefit-plans.pdf.

bios

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