



Professional Liability Insurance

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Professional Liability Insurance Policy

Purpose

The Treasury, Postal Service, General Government Appropriations Bill for Fiscal Year 2000 signed by the President on September 29, 1999, requires agencies to use funds appropriated for salaries and expenses to pay an amount not to exceed one-half the costs for eligible employees who elect to purchase professional liability insurance.

Policy

Operating Units must reimburse any qualified employee within their organization not to exceed one-half the costs incurred by the employee for professional liability insurance premiums.

- By law, organizations shall reimburse up to half the cost of professional liability insurance for eligible employees. To ensure the equitable application of this provision, Department operating units will pay one-half the cost, not to exceed \$150.00, per calendar year.
- Reimbursement will be issued through the Department's automated personnel/payroll system, the National Finance Center (NFC), through Direct Deposit/Electronic Funds Transfer (DD/EFT).
- Payment for reimbursement of Professional Liability Insurance premiums will be made in one lump sum payment after the entire premium is paid and the Professional Liability Insurance Reimbursement Claim Form and all required documentation is provided to the servicing human resources office (SHRO) by the employee.
- Reimbursement for Professional Liability Insurance premiums are tax exempt since they meet the definition of an "accountable plan" under Internal Revenue Service Code.

Coverage

Covered employees include supervisors and management officials, as defined by the Civil Service Reform Act (5 U.S.C. 7103(a)) and any law enforcement officer covered under 5 U.S.C. 8331(20) or 8401(17), or under 22 U.S.C. 4823.

Definitions

The terms referred to in this policy have the following specific meanings:

- Professional Liability Insurance means insurance, which provides coverage for:

"Legal liability for damages due to injuries to other persons, damage to their property, or other damage or loss to such persons (including the expenses of litigation and settlement) resulting from or arising out of any tortuous act, error, or omission of the covered individual (whether common law, statutory, or constitutional) while in the performance of such individual's official duties as a qualified [eligible] employee; and "

The cost of legal representation for the covered individual in connection with any administrative or judicial proceeding (including any investigation or disciplinary proceeding) relating to any act, error, or omission of the covered individual while in the performance of such individual's official duties as a qualified [eligible] employee, and other legal costs and fees relating to any such administrative or judicial proceeding."

- Supervisors and Management Officials have the respective meaning defined by 5 U.S.C. 7103(a) as follows:

Supervisors are "... individual[s] employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority;"

Management Officials are "...individual(s) employed by the agency in positions the duties and responsibilities of which require or authorize the individuals to formulate, determine, or influence the policies of the agency;" and

'Law Enforcement Officers are "...employees, the duties of whose positions are primarily the investigation, apprehension, prosecution, detention or supervision of individuals suspected of, or convicted of offenses against the criminal laws of the United States, including any law enforcement officer under Section 8331(20) or 8401(17) of such title 5, or under Section 4823 of Title 22, United States Code."

Considerations and Issues

- Eligible employees must make personal judgments concerning their liability and need for the coverage and purchase of personal liability insurance.
- Operating units must designate a point-of-contact (POC) to assist employees in reaching their decisions.
- No Department official will endorse any professional liability insurance carrier.

Tax Liability

Reimbursement for Professional Liability Insurance premiums are tax exempt since they meet the definition of an "accountable plan" under Internal Revenue Service Code.

Responsibilities

The following actions are required to facilitate the reimbursement process:

Department Responsibilities

The Departmental Office of Human Resources Management (OHRM), Professional Liability Insurance Program Manager (Phyllis Alexander PAlexander@doc.gov), is responsible for issuing an annual all-hands broadcast message reminding employees of the policy for Professional Liability Insurance and providing a listing of the operating unit point-of-contacts (POCs). The OHRM will also maintain an updated POC listing on the DOC's OHRM web site, as appropriate.

Operating Unit Responsibilities

Operating Units are responsible for designating a POC to facilitate the reimbursement of Professional Liability Insurance premiums for their clients and ensuring the OHRM's Program Manager is kept updated of any changes to POCs. Operating units are also responsible for evaluating employee requests for reimbursement of Professional Liability Insurance premiums and assisting employees in decisions about purchasing Professional Liability Insurance. In determining the manner in which employees are to be reimbursed, operating units may allow employees to:

- Submit proof of payment of Professional Liability Insurance premiums any time during the calendar year and reimburse the employee in a lump sum payment, or
- Pay the premiums through biweekly payroll deduction and reimburse the employee (up to one-half of the costs of Professional Liability Insurance, not to exceed \$150.00) for premiums incurred after the entire premium is paid for the calendar year. Operating units allowing for payment of Professional Liability Insurance premiums via payroll deduction must inform employees that the employee is responsible for establishing the payroll deduction via the National Finance Center's (NFC) Employee Personnel Page, and monitoring the payroll deductions and stopping the deductions once the total premiums are paid.

Servicing Human Resources Offices (SHROs) are responsible for verifying the employee's eligibility for reimbursement and ensuring the accurate and timely processing of reimbursement for Professional Liability Insurance premiums paid. The SHRO must also effect biweekly payroll deduction for Professional Liability Insurance premiums, if offered by the operating unit and elected by the employee.

Employee Responsibilities

Employees are responsible for contacting their operating unit POCs to determine eligibility for reimbursement of Professional Liability Insurance. Employees who opt to pay Professional liability Insurance premiums through biweekly payroll deduction are responsible for:

- Establishing the payroll deduction through the NFC's Employee Personnel Page, Self-Service feature, Financial Allotment option.
- Monitoring payroll deductions and stopping them once the premium is paid in full or cancelled by the employee or insurance carrier.
- Providing all necessary information in a timely manner to the SHRO to facilitate reimbursement of the premiums, including a completed Professional Liability Insurance Reimbursement Claim Form and all required supporting documentation.

Cancellation or Discontinuance of Insurance

Employees who discontinue or cancel or their Professional Liability Insurance before the end of the coverage year may be reimbursed on a pro-rated basis. In all cases of discontinuance or cancellation, employees should ensure that the Professional Liability Insurance Reimbursement Claim Form and all required supporting documentation are submitted to the SHRO as soon as possible to receive reimbursement for premiums.

Processing Procedures

Upon receipt of the Professional Liability Insurance Reimbursement Claim Form and all required supporting documentation, the SHRO must verify the employee's eligibility through the NFC's Information Research Inquire System (IRIS). Supervisors or management officials will be identified with a supervisory code of 2, 4, or 5, and law enforcement officers will be identified with an occupational series code of 1811. Reimbursement for Professional Liability Insurance premiums must be processed through the NFC's Entry, Processing, Inquiry, and Correction System (EPIC) system via an allowance document. When processing the reimbursement, select:

- "Professional Liability Insurance" as the allowance description
- Enter "no" in the taxable field
- Enter the total amount to be refunded in the "allowance rate". Do not enter anything in the "percentage of base" field.

Program Oversight and Reporting Requirements

Operating units will be responsible for establishing internal procedures to ensure that all eligible employees requesting reimbursement for professional liability insurance premiums receive the required reimbursement. The OHRM will conduct such oversight activities as required to ensure that the program is being administered in accordance with regulatory requirements.

[Professional Liability Insurance Reimbursement Claim Form](#)

Office of General Counsel Talking Points

An "All Employee" e-mail on February 1, 2000, announced that the Department will reimburse supervisory and management officials and law enforcement officers electing to purchase professional liability insurance, one-half of the annual premiums for any premium payment made on or after October 1, 1999, up to \$150. Since that announcement, we have had several inquiries from employees asking if they should purchase professional liability insurance. The decision to purchase the insurance is one which each employee must make based on their individual circumstances. Although the decision is ultimately a personal one, the "Talking Points" below provided by the Office of General Counsel offer valuable information which should assist employees in making that determination.

Talking Points Regarding Professional Liability Insurance

Current Coverage as a Federal Employee Representation by the Department of Justice (DOJ)

- If a Federal employee is sued in his/her individual capacity, he/she can request DOJ representation. "When an individual's actions were within the scope of employment and such representation is in the interest of the U.S."
- The employee must submit a written request for DOJ representation to the official in the agency who is designated to review the request. Unless the Federal agency concludes that representation is clearly unwarranted, it submits to DOJ a statement containing its findings as to whether the employee was acting in the scope of his/her employment and its recommendations for or against providing representation. 28 C.F.R. § 50.15(a)(1).
- DOJ will determine whether the employee's actions reasonably appear to have been performed within the scope of his/her employment and whether providing representation would be in the best interests of the United States. 28 C.F.R. § 50.15(2)(e).
- If DOJ denies representation, the employee can seek Federal court review. If the district court determines the employee was acting within the scope of his/her employment, it can so certify. This would permit the removal of the employee as an individual defendant and substitution of the United States.

-- According to a 1998 Office of Personnel Management (OPM) report, over the previous five years DOJ received 7,000 requests for representation from Federal employees. DOJ rejected 150 of those requests. Brian Friel, Managers Rarely Found Liable In Lawsuits, Government Executive, May 29, 1998.

- Representation is generally not available in Federal criminal proceedings. 28 C.F.R. § 50.15(a)(4). The rationale for this is that the United States would be both prosecuting and defending the case, which is a conflict of interest.
- If a conflict exists between the legal and factual positions of various employees in the same case which make it inappropriate for a single attorney to represent them all, DOJ may separate the employees into as many compatible groups as is necessary to resolve the conflict problem and each group may be provided with separate representation. Circumstances may make it advisable that private representation be provided to all conflicting groups. 28 C.F.R. § 50.15(a)(10). An employee, under such circumstances, may receive reimbursement for private counsel fees. 28 C.F.R. § 50.16(a).
- Upon entry of any judgment for money damages rendered against an employee, the Federal employee may apply for such indemnification from his/her employing agency. 28 C.F.R. § 50.15(a)(8)(iii).

-- According to the 1998 OPM report, over the previous 5 years, only 14 Federal employees were found personally liable in lawsuits brought against them in relation to their government duties. In 11 of the 14 cases, agencies indemnified the employees. In one other case, the employee paid nominal damages of \$1. In another, the employee's automobile insurance company paid the damages. In only one reported case did an employee pay damages. Brian Friel, Managers Rarely Found Liable In Lawsuits, Government Executive, May 29, 1998.

Indemnification by the Department of Commerce (DOC)

- DOC's indemnification regulations are found at 15 C.F.R. Part 15, Subpart D.
- DOC may indemnify a present or former Department employee who is personally named as a defendant in any civil suit in state or federal court, or other legal proceeding seeking damages against a present or former Department employee personally, for any verdict, judgment or other monetary award which is rendered against such employee. 15 C.F.R. § 15.31(a).
- Indemnification will only be made where it is determined that the employee's conduct giving rise to the verdict, judgment or award was taken with the scope of his/her employment and such indemnification is in the interest of the Department. 15 C.F.R. § 15.31(a).
- Upon service of process or pleadings in an action or proceeding, the employee must, within 5 calendar days of receipt, deliver all such process and pleadings with a fully detailed report of the circumstances of the incident giving rise to the court action or proceeding to the General Counsel or his designee. 15 C.F.R. § 15.32(a). The employee must fulfill this requirement in a timely fashion in order to subsequently request indemnification. 15 C.F.R. § 15.32(b)(1).
- The employee, after receiving the verdict, judgment, or award, may request indemnification through the employee's supervisory chain to the head of the employee's component. The request will include an explanation of how the employee was working within the scope of his/her employment and whether the employee has insurance or any other source of indemnification 15 C.F.R. § 15.32(b)(2).

- The head of the component will forward the employee's request with a recommendation to the General Counsel for review. A detailed analysis of the basis for the recommendation must be made and the head of the component must certify that the component has funds available to pay the indemnification. 15 C.F.R. § 15.31(b)(3).
- The General Counsel reviews the circumstances of the incident giving rise to the action or proceeding, and all data bearing on whether the employee was acting within the scope of his/her employment. Where appropriate the views of the Department of Justice or the U.S. Attorney's Office handling the matter will be sought. 15 C.F.R. § 15.31(c).
- The General Counsel forwards the request along with the General Counsel's recommendation to the Secretary for decision. 15 C.F.R. § 15.31(d).

Professional Liability Insurance (1)

WHAT DOES PROFESSIONAL LIABILITY INSURANCE COVER?

In addition to court proceedings, professional liability insurance may cover certain administrative proceedings. These include where the employee:

- Is the subject of an Inspector General (IG) investigation;
- Is accused of engaging in whistleblower reprisal by Office of Special Counsel (OSC);
- Is named as a responsible management official in an equal employment opportunity (EEO) complaint; or
- Is the subject of a disciplinary action, such as suspension, demotion, or removal for alleged misconduct.

While the Office of General Counsel will provide representation with regard to OSC or EEO proceedings,(2) it does not provide such representation during an IG investigation or when the employee is the subject of a disciplinary action.

Furthermore, there is no legal authority to reimburse an employee for attorney's fees incurred during an IG investigation, Reimbursement for Banking Charges and Attorney's Fees-Inspector General Investigation, B-212487 (Apr. 17, 1984), or for representation during a disciplinary action which does not result in an appeal to the MSPB. Payment of Attorney Fees Incurred by Employee During the Administrative Settlement of a Personnel Action, B-253507 (Jan. 11, 1994).

- Legal representation is also provided during prosecution for an alleged criminal act until an initial finding of guilt.
- However, if an allegation concerns a matter outside the scope of the employee's duties, it would not be covered by the insurance.
- Professional liability insurance may also provide additional legal help even if DOJ decides to represent a covered employee.

- One of the professional liability insurance companies has informed us that under their policy, while a manager may recommend an attorney to represent him or her, the company has the final say on which attorney will be provided for representational purposes.

Conclusion

These talking points are provided to inform Federal employees about representation by DOJ and DOC, as well as indemnification. The decision to carry professional liability insurance is a personal one.

1. Government Executive Magazine has published several articles on professional liability insurance. These articles include: G. Jerry Shaw, Do You Need Liability Insurance?, February 2000; Brian Friel, Liability Insurance Q&A, October 28, 1999; and Brian Friel, Managers Rarely Found Liable In Lawsuits, Government Executive, May 29, 1998. They can be accessed at the web site: <https://www.govexec.com/>.
2. The Office of General Counsel's representation is on behalf of the Department of Commerce, not the individual employee. So long as the interests of the Department and the individual are aligned, OGC will represent the employee. On occasion, where during the processing of a case, the employee's interest and the Department's interest have diverged; OGC has sought to settle the case.