Marshall & Sterling

HUMAN SERVICES & SCHOOLS
SPECIALTY INSURANCE PROGRAM

Just Press Play!

View our Risk Management video collection from Marshall & Sterling

When you work with vulnerable populations, it's key to have liability waivers in place. Learn how important and easy it is to update your liability waivers – in just 3 easy steps! Click to watch!

Featured Link of the Month:

Safe Kids Worldwide is a global organization dedicated to protecting kids from unintentional injuries. Their site is full of ideas and tips for keeping kids safe: www.usa.safekids.org/

The Human Services & Schools Specialty Insurance Program from Marshall & Sterling provides a risk management path for you to follow including resources on safety, operations and regulatory compliance. The articles enclosed are packed with information to use in your everyday operations. Contact me with any questions!

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DOL New Overtime Payment Rules Series: White Collar Exemptions, Salary Requirements and Calculating Employee Wages

The FLSA establishes minimum and overtime wage payment protections for most workers in the United States. However, the FLSA also offers a range of minimum wage and overtime exemptions for certain workers. The white collar exemptions are minimum wage and overtime pay exemptions available to certain administrative, professional, outside sales, computer and highly compensated employees.

To qualify for the white collar exemption, an employee must meet a **salary basis test**, a **salary level test** and a **duties test**. An employee must meet all three tests in order to be exempt from FLSA minimum wage or overtime pay requirements.

- ✓ The salary basis test is used to make sure the employee is paid a predetermined and fixed salary that is not subject to reduction due to variations in the quality or quantity of work.
- ✓ The salary level test is used to ensure that the employee meets a minimum specified amount to qualify for the exemption. This salary threshold provides employers with an objective and efficient way to determine whether an employee qualifies for a white collar exemption.
- ✓ The duties test requires that the employee's job duties conform to executive, administrative or professional duties, as defined by law. This analysis requires a more thorough evaluation of whether an employee can be classified in one of the categories mentioned above (administrative, professional, outside sales, computer and highly compensated employee)

Higher Salary Threshold Requirement

The final rule increases the minimum salary level of $455 per week ($23,660 per year) to **$913 per week** or $47,476 per year. The new salary level represents the 40th percentile of wages earned by workers in the lowest-wage census region in the United States (currently the South) for a full-year worker.

The final rule also increases the $100,000 salary level for highly compensated individuals to **$134,004 per year**—the 90th percentile of wages earned by full-time workers across the entire United States.

These higher salary levels will be updated every three years to maintain the salary level at their corresponding 40th or 90th percentiles. The first automatic rate update is expected by Jan. 1, 2020. The DOL will publish updated rates in the Federal Register and on the Wage and Hour Division's website at least 150 days before their effective date.

Calculating Employee Wages

Administrative, Executive & Professional Employees

The final rule will allow, for the first time, non-discretionary bonuses and incentive payments (including commissions) to be used to satisfy up to 10 percent of an employee's standard salary level. This may include the payment of non-discretionary incentive bonuses tied to productivity and profitability. Non-discretionary bonuses and incentive payments may be used if they are paid on a quarterly basis, but more frequent payments are acceptable. However, the DOL will allow employers to make some "catch-up payments."

The DOL will also allow employers to use significantly large bonuses toward 10 percent of the required salary amount.

Highly Compensated Employees

Under the final rule, highly compensated employees qualify for an overtime exception if they meet the new salary level of $134,004 per year. However these individuals must receive at least the full standard salary amount each pay period (i.e., $913 per week, $1,826 bi-weekly or $3,956.33 per month) on a salary or fee basis (not counting non-discretionary bonuses and incentive payments).

The remainder of a highly compensated employee's wages may be calculated by including the full amount of non-discretionary bonuses and incentive payments (including commissions).

Do You Know the Common Directors and Officers (D&O) Insurance Exclusions?

After assessing your company's risks, you've made the decision to purchase directors and officers (D&O) insurance. Now what?

It's essential to know the ins and outs of your D&O policy, including policy limits, what's covered and, most importantly, what's not. Why? Because you may assume you're covered for a claim when policy exclusions could apply. As time consuming as it may be, it's critical to read the fine print in your policy, as the language in the exclusions may affect the coverage of potential claims.

Types of Exclusions in D&O Policies

Some exclusions that insurers and insureds dispute about concern incidents that happened or allegedly happened before the D&O policy went into effect. In some cases, the insurer simply won't cover the claim; in other cases, the insurer may render the policy void:

- **The known circumstances exclusion:** With this exclusion, the insurer will not pay for claims that arise from a negligent act, error, omission or personal injury that occurred prior to the start date of the D&O policy. The insurance carrier attests that the insured *knew or could have foreseen* that any of the above happened and could have been the basis for a claim. This exclusion is found more frequently in private and nonprofit policies than in public company policies. What is especially important to note is that the premium is usually not returned to the insured if it is determined that they withheld their knowledge of circumstances that occurred prior to the start of the policy.

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- **Recession:** The premium is returned to the insured. Rescission means that the policy is rendered void after the insurer discovers that the insured answered

  untruthfully to any of the warranty questions on the insurance application. Warranty questions ask the applicant if they know of any fact, circumstance or situation that might reasonably be expected to give rise to a claim. Rescission also can occur if the applicant provided false or misleading information in the company's financial data. These scenarios usually happen only in public company D&O policies.

- **Prior acts exclusion:** Similar to the known circumstance exclusion, this exclusion is also concerned with pre-policy circumstances. The insurer is not responsible for wrongful acts committed or attempted before the coverage was enacted. A wrongful act is that which damages the rights of another. These acts are not only limited to criminal offenses, but can also include acts that result in civil lawsuits.

Other exclusions found in D&O policies revolve around the duty to defend and defense expenses in the event of a claim. If the insurer has the right to the duty to defend, then they are able to select the insured's defense and have greater control over the rates and billing practices of the defense counsel:

- **Reasonableness of defense fees:** This is more prevalent in private company and nonprofit D&O policies, as most of those policies give the insurer the right and duty to defend the insured's claims; whereas, public companies retain the right to choose their own defense counsel. If this is written into your D&O policy, it means that the insurer will only pay for "reasonable and necessary" defense fees. Some insurers also provide detailed information on litigation guidelines.

- **Consent to settle and the hammer clause"** If the insurance carrier has no duty to defend, such as in cases against public companies, then they have no right to settle the case when they want to settle it. As a result, the insured may elect to continue with litigation, even if that would exhaust the policy limit, because the defendants don't want settling the case to be perceived as an admission of their wrongdoing or incompetence. This creates a lot of tension between insurers and the insured, especially if the insured does not include the insurer in the settlement discussion. Therefore, some insurance policies have a consent to settle exclusion in the policy, prohibiting the insured from settling the claim without the insurer's prior written consent.

  The hammer clause is similar to the consent to settle exclusion, although less common. Basically, the hammer clause informs the insured that if they go against the insurer's recommendation to settle, the insured will be responsible for any judgment won by the plaintiff plus legal fees that go beyond the settlement offer.

Most D&O insurers expect that D&O insurance is only a part of a company's wider insurance portfolio. In some cases, however, this assumption doesn't always prove to be true. Certain firms may go without Umbrella insurance or even General Liability insurance policies, making D&O one of their only forms of insurance. Because of this, many D&O insurers write exclusions in their policies stating what claims they won't cover because other types of insurance would potentially cover the claim:

- **"Other insurance" exclusions:** D&O insurance is just one form of insurance in a comprehensive risk management plan for most companies. Because of this, most D&O policies have exclusions for claims that involve bodily injury, property damage and Employee Retirement Income Security Act (ERISA) claims, which could be covered by other types of insurance such as a Commercial General Liability policy or a Fiduciary Liability policy. To protect their best interests in the event of a claim, the insured should notify all insurers from their various policies, thus allowing the insurers to determine who is liable for the claim.

- **Contractual liability exclusion:** This exclusion is especially pertinent to private companies and nonprofits that have broad entity coverage under a D&O policy. Since contractual obligations are not liabilities imposed by law but rather an obligation that is voluntarily undertaken, many D&O policies have an exclusion that prevents insurers from having to cover contract-related claims, especially breaches of contract that arise when the company enters into a contract with another party.

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When examining this exclusion in your D&O policy, make special note of the wording of this clause. This exclusion can substantially affect the extent of your coverage under the policy—the narrower the scope of the exclusion, the better for you.

D&O insurance protects directors and officers from poor business decisions, but most policies do not protect them from wrongful acts and gross misconduct. These exclusions include the following:

- **Conduct exclusions:** Most D&O policies have exclusions that deny coverage for certain types of misconduct. There are two categories of misconduct exclusions:

  1. For loss relating to fraudulent or criminal conduct
  2. For loss relating to illegal profits or remuneration to which the insured was not legally entitled

  It's especially important to look at the wording on these exclusions in the policy; subtle wording differences can significantly affect the accessibility of the coverage.

- **Insured versus insured exclusion:** In some D&O cases, one insured director may bring a claim against another insured director, and some insurers do not want to cover this because they don't want to get involved in the infighting between a company's directors and officers.

However, with recent changes to the whistleblower provision of the Dodd Frank Act, most insurers are now agreeing to cover insured vs. insured claims if the whistleblower is also one of the insured directors. Obtaining D&O insurance is important to protect the directors and officers of your company; but simply purchasing the policy won't benefit you unless you know the extent of your coverage.

Do you understand your D&O insurance policy? Contact our Human Service & School Specialty Insurance Program specialists today for more information about your coverage and exclusions.

The Importance of an Audit Committee

In recent years, several companies have found themselves on newspaper front pages for illegal business activities. In response to these events, organizations are recognizing the tremendous value an audit committee is to their company. These committees serve to ensure that all financial dealings are legal and ethical, and assure that there is no fraudulent behavior within the company.

Businesses have also responded to the regulations set forth by the Sarbanes-Oxley Act of 2002. The Act outlines standards regarding financial dealings and auditing procedures within publicly traded companies. However, several provisions also apply to nonprofits, which instruct organizations to establish concrete auditing procedures. For instance, it provides explicit provisions for electing audit committee members, protections for whistle-blowers and regulations regarding the destruction of documents.

As a result of notable scandals, nonprofits must remain educated concerning the design and responsibilities of an audit committee to ensure that their organization remains financially strong and responsible.

Audit Committee Members

According to the Sarbanes-Oxley Act, a company's audit committee must be comprised of members of the Board of Directors who are also considered "independent." This means that committee members must not receive compensation for their services on

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the audit committee or within the organization in another function, except if they are paid as a Board of Directors member. Generally, though, members of the board are volunteers and do not receive compensation.

The committee must also contain one designated finance "expert" who interfaces with the auditor. This person must have the knowledge and ability to analyze financial documents. The other members should also be financially competent enough to make sound financial decisions. Specifically, they should be able to select a credible auditing firm and understand the audit data once it is completed.

Protect your organization from high-profile scandals and remain in compliance with federal law with appropriate safeguards, including an audit committee.

Responsibilities

Nonprofits conduct audits through an outside professional, with that auditor's purpose being to discover any fraudulent activities within the organization. The auditing committee will then work with the auditor and the Board of Directors to identify financial red flags and ensure that all aspects of the organization are operating legally.

In addition, the auditing committee supervises the organization's management and oversees the finance reporting procedures, including the following duties:

- Selects the outside auditor without management input to ensure there is no conflict of interest
- Works with the auditor to regulate the organization's finances on a regular basis and especially at the end of the fiscal year
- Establishes a level of openness within the organization, and encourages employees and board members to speak up about any fraudulent activity
- Monitors the organization's operations and risk management controls
- Ensures that all financial reporting within the organization complies with federal and state regulations, and follows the doctrines established by the Board of Directors

Insurance Options

There are several insurance options available to combat losses in the event of fraudulent activity. These coverage options, along with an audit committee, can add financial security to a nonprofit organization.

- Employee Dishonesty Coverage: Protects the organization in the event of fraudulent activity of one or more employees including loss of funds, property and securities.
- Fiduciary Dishonesty Coverage: Covers the loss of assets from an ERISA plan in the event of theft or larceny by an employee of an organization.
- Fiduciary Liability: Protects employee welfare and pension plans, the organization itself and the individual fiduciaries of the plans. Covers any liability from violations of responsibility, obligation or duties imposed upon the fiduciaries by ERISA.

Contact us for more information about the best coverage options to protect your nonprofit entity.

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