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What every general counsel and law department needs to know about employed lawyers coverage

The "devil is in the details" as ELC is offered on terms and conditions that vary significantly from form to form

By Lynda A. Bennett

Employed lawyers coverage (ELC) is essentially legal malpractice insurance for in-house attorneys. Many lawyers who work in-house assume that they are covered for alleged malpractice under the company's directors and officers (D&O) policy. However, that may be a dangerous assumption. Some D&O policies contain a "professional services" exclusion that may be construed to bar coverage for legal malpractice claims. Other D&O policies may not include legal advice within the definition of "wrongful acts" that qualify for coverage under the policy. Finally, some in-house counsel may provide legal advice that falls outside of the scope of their employment with the company such that a coverage gap exists.

For all of these reasons, general counsel and the lawyers who work in their legal department have a vested interest in determining whether their organization has ELC and, if so, the scope of coverage provided. Like most insurance policies, the "devil is in the details" as ELC is offered on terms and conditions that vary significantly from form to form; therefore, consulting with an insurance professional and/or coverage counsel to audit such coverage is strongly encouraged.

Below are few guideposts to consider when employed lawyers coverage is evaluated.

"Capacity" issues

Some in-house counsel may believe that they don't need to have ELC because they will be covered by D&O insurance. The availability and scope of that coverage will depend heavily on the precise allegations that are made against the in-house lawyers. In some circumstances, in-house counsel may be named in the lawsuit based on business advice provided to the board such that the D&O policy will apply. However, if a lawsuit contains allegations that in-house counsel provided in-firm legal advice to the company, the D&O insurer may deny coverage. And sometimes, the nature of the advice provided by in-house counsel may not be clear cut. A perfect example of "grey area" capacity can be found by when in-house assist with, and advise on, the preparation of public filings. In order to avoid these kinds of coverage gaps, ELC should be put in place.

In addition, in-house who are involved with private equity, hedge funds, or investment management organizations should give careful consideration to

the entities to which they dispense legal advice. For example, the baseline ELC form may not address legal advice that is provided to portfolio companies and/or private equity directors/officers asked to serve on portfolio company boards.

"Moonlighting services"

Another reason to secure ELC relates to the legal services in-house inevitably provide that are outside of the legal work that they hired to do for their corporate employers. For example, many in-house counsel enjoy keeping their hands in legal practice by performing *pro bono* legal services and/or participating in corporate-sponsored *pro bono* initiatives. Most ELC forms provide coverage for *pro bono* projects that result in a lawsuit. Similarly, many ELC forms will provide coverage when in-house counsel is asked to perform "personal" legal work for executives of the company as well as, in some instances, friends and family. Thus, when in-house is asked to prepare a will, perform a real estate closing, or advise on sticky personal matters, they do not have to "fly without a net" when ELC is in place.

Coverage by endorsement v. "stand alone" coverage

Assuming ELC is in place, another important consideration is how much coverage is available for legal malpractice claims. It is not uncommon to see ELC added by endorsement to the company's D&O policy. Coverage by endorsement is fine, though careful consideration must be given to the limits of liability provided. For example, when ELC is added by endorsement, it is usually subject to a "sub-limit" that is lower than the overall D&O policy limit.

In addition, when ELC is added to the D&O policy by endorsement, it is subject to the overall (i.e., the aggregate) limit of the policy. Thus, if the company sustains a large D&O loss that exhausts the policy in a particular policy year, in-house counsel may be "bare" for legal malpractice claims. Relatedly, all directors, officers, lawyers and the company have equal access to the limits available under the D&O policy. Therefore, a large claim, or several small ones, may create a "chase" for the limits.

Moreover, most D&O policies are no longer limited to covering just D&O risks. Instead, companies now purchase an executive liability policy that covers D&O, employment practices, fiduciary, crime, cyber, and kidnap & ransom risks, all of which are subject to one aggregate limit. Again, this type of "package" policy can create "limits tension" among the insureds.

To avoid these issues, in-house counsel may want to consider securing a "stand alone" ELC policy, particularly if the legal department employs several lawyers.

Conclusion

There is simply no getting around it. No matter how ELC is secured, someone must read the policy to evaluate the precise terms and conditions offered. Only then will in-house counsel be able to confirm that they are insured for all aspects of their job function and their "off the clock" legal advice.

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