

Risk Management 5

Risk Management (cont'd)

When and How should we report claims to our insurance company?

No one likes or expects to suffer an insured loss. Consequently, many nonprofits do not establish claim or accident reporting procedures. While most insurance policies contain information on the applicable reporting procedures, most insureds just file their policies without review.

The most important consideration in reporting claims is to notify the insurance company as soon as practically possible following an accident or loss. Studies have shown that the prompt reporting of an incident is key to keeping claims costs down, having a satisfied claimant, and reducing the chances that the accident will result in a lawsuit.

The claim reporting process does not have to be complex if the organization plans for it properly. Everyone in the organization should know what to do in case of an accident or loss and how to report a claim. Keep the procedures simple to ensure that people will follow them. The following suggestions will help you with the process.

1. Research how your insurance company and insurance advisor want you to report claims and incidents.

- Who do you call?

Ask your insurance advisor to explain how you should report claims. The organization needs to know whether to call the advisor or the insurance company first. The answer may vary by policy. For property losses, the advisor may want you to call their office first and they will notify the insurance company. For liability losses, notify the company first.

- "Incidents" versus "Claims"

Another issue is whether or not the company wants you to report every incident or only claims. Some insurance agents worry that if the insured submits every incident, the insurance company will cancel the policy due to heightened concern about potential losses. Insurers establish "reserves" (loss estimates) for every reported incident that can lead to a claim payment. Reporting four alleged wrongful terminations might result in reserves as high as \$100,000. The amount "reserved" for potential losses might influence the underwriter's decision about the renewal coverage. On the other hand, if the organization does not report the claim promptly, the insurer may deny coverage and its ability to defend the claim maybe impaired significantly.

If your operation generates frequent, small claims, such as animal bites at a shelter, confer with your insurance company to set the appropriate method for such reporting incidents. One option is for the organization to complete an "incident report" that they do not submit to the company. The incident report

contains basic loss information of the injured person's name, address and telephone number, date and time of incident, witnesses' names, addresses and telephone numbers, and a brief description of the incident. The organization can maintain the files and if one incident turns into a claim, submit the information to the insurance company. The insurance company will tell you how they want to handle claims submissions. The insurer may want to receive the incident reports quarterly or not at all.

- Claims Forms

Ask the insurance company what form(s) they want you to use for submitting claims. Most often, the first notice will be a telephone call. Follow the call with a completed claim form. Some companies will accept any form while others have specific forms designed for certain coverages.

- Names, Addresses, and Telephone Numbers

For each policy, list the company's name, address, and telephone number for reporting a claim. Ensure that the appropriate people receive a copy. Update the information sheet annually or whenever the insurance agent or company notifies the organization of a change.

2. What does the Policy Say?

All insurance policies contain Conditions that are the policy provisions detailing the insured's responsibilities. A common condition is "Duties in the Event of Accident, Claim, Suit or Loss." Review each policy to identify your duties. The first duty is always to notify the company or an authorized representative "as soon as practical" or to give "prompt notice." The Duties will also detail the claims reporting steps including the information required (how, when and where the accident or loss occurred, names and addresses of the insured, the injured parties and any witnesses). Summarize the duties by policy so you have a ready reference in case of a claim.

Claims made policies have distinct claims reporting requirements. The date that the insured notifies the insurance company of a claim or incident "triggers" the coverage of a claims made policy. Therefore, understanding the policy's reporting requirements is critical. Some policies differentiate between a claim and a notice and place very strict requirements on an insured. Claims reporting is especially important if the organization is changing insurance companies or converting from or to an occurrence policy.

3. Establish Accident Procedures.

- Internal Procedures

Establish organizational procedures for the reporting and handling of all accidents and claims. The procedures should explain what a person is to do if there is an accident and whom they should call. Do you want employees and

volunteers to call the insurance company or someone within the organization? Keep in mind that you need to notify the insurance company as quickly as possible. Also consider various contingencies, what if the accident occurs during non-business hours or in another town or state? What if the accident involves a serious injury or death? Do you want the Executive Director or other key people to be notified promptly? Once you have developed the internal procedures, train everyone. Ensure that the appropriate people have the information and forms that they need.

- Initial Notice Follow-Up

After the organization submits the initial notice, further investigate the claim. Identify which policies may respond to the loss. A single accident can involve several different policies, such as an employee's automobile accident may apply to the automobile, workers compensation and, if a severe accident, the umbrella or excess policy. If you have an umbrella or excess policy, determine whom the policy requires to notify the insurer -- the insured or the primary insurance companies.

Many states require that employers report workers' injuries to a state agency within a specified time period. Research the requirements for the states in which your employees work or travel. While investigating the first claim report, make sure that someone notified the appropriate state agency.

4. Maintain Claims Records.

Maintain copies of all notices and correspondence related to any claims or incidents. These records may become key in a later settlement. The length of record retention varies by type of loss. The organization should retain the file of any claim involving a child for a minimum of three years (or the appropriate statute of limitations) after the child reaches the act of majority. Check with your legal counsel for retention recommendations.

5. Maintain a Policy History.

Many nonprofit organizations provide services that may not result in a claim for many years. Any organization providing medical services or working with children faces the possibility of being sued many years after the alleged incident. After receiving notice of such a suit, many nonprofits spend time searching to discover what, if any, insurance coverage they had at the time. To avoid this problem, maintain a record of the organization's insurance policies. Research as far back as you can and document the information listed below. If possible, retain a copy of the policy's Declarations Page.

- Name and address of insurance company
- Name and address of insurance agent or broker
- Type of policy

- Policy inception and expiration dates
- Policy limits and deductibles or retained limits
- Policy coverages

Keep this policy history in a secure place with a backup copy stored elsewhere. Establish a file for storing all past insurance policies. Again, legal counsel can offer guidance on how long to retain these policies. The nature of the organization's operations may dictate the retention limit.

Summary

Communication between your organization, its insurance advisor and insurance companies is the key to an effective claims reporting system. The companies are the best ones to tell your organization how they want you to handle any claims or incidents. Everyone benefits from the timely reporting of claims -- the claimant, organization and the insurers. Working together, you can establish an efficient claims reporting system.

What contractual measures are available to control risk?

Risk management theory suggests the use of four major tools in controlling risks: avoidance, modification, retention, and transfer (sharing). The transfer options include both the purchase of insurance and the contractual transfer of risk to another party. For organizations seeking to minimize potential liability, they should consider risk transfer as a useful risk management tool. The transfer or "sharing" of risk through an insurance contract represents an exchange of a specific premium for the uncertainty of a large financial loss. The insurer who collects the insurance premium agrees to bear the cost of potential losses. As with other risk transfer tools, however, the insurance transfer is not complete. Even with insurance, the nonprofit insured retains the risk of negative publicity and loss of donor or public support that may accompany an insured loss. A nonprofit also faces these reputational risks when it transfers risk through a contractual arrangement. However, the use of contracts provides another tool for nonprofits to protect its assets.

Waivers

A participant waiver is a type of hold harmless agreement that the organization creates to protect itself from the potential claims of participants in an activity it sponsored. Humorist Dave Barry's parody of a waiver goes overboard to show voluntary acceptance of the risks of skiing.

The undersigned agrees that skiing is an INSANELY DANGEROUS ACTIVITY, and that the rental personnel were just sitting around minding their OWN BUSINESS when the undersigned, who agrees that he or she is a RAVING LOON, came BARGING IN UNINVITED, waving a LOADED REVOLVER and demanding that he

or she be given some rental skis for the express purpose of suffering SERIOUS INJURY OR DEATH, leaving the rental personnel with NO CHOICE but to . . .

Although an individual's behavior (for example, engaging in an obviously hazardous activity such as sky-diving) occasionally implies a waiver or release, the term refers to an express or written agreement customarily. Liability waivers are valid only if the person enters into the agreement knowingly, voluntarily and the person waiving certain rights receives something in exchange. Few attempted waivers satisfy these standards. Courts often find that arrangements are not voluntary when they are between an individual and an organization because of unequal bargaining power. Courts often invalidate waivers on the grounds that a participant did not fully appreciate the rights being waived or that the waiver did not specifically indicate that it covered liability for negligence.

While programs serving young people use waivers often, it is important to remember that minors do not have the capacity to sign contracts. The courts will strike a waiver signed by minors generally. In a recent Florida case, a state appeals court ruled that, although she had signed a waiver, a 13 year-old was not prevented from suing a ranch for injuries she sustained when she fell off a horse. The document signed by the young girl was as follows:

In consideration of permission granted to me to ride [horses at the ranch] I hereby, for myself, my heirs, administrators, and assigns, release, remise, and discharge the [ranch] and its agents and employees, of and from all claims, demands, actions and injuries, sustained to my person or property as a result of any act, omission, or negligence [of the ranch] while riding [horses] on the premises of [the ranch].

I am aware of the risks and dangers involved in horseback riding and that unanticipated and unexpected dangers may arise, and I assume all risks of injury to my person and property that may be sustained as a result.

I represent and certify that I am at least 18 years of age, or if I am under the age of 18 years old, I represent and certify that I have the permission of my parents or guardian to rent and ride [horses at the ranch] and that they have full knowledge thereof...

While acknowledging the general effectiveness of clearly worded and unequivocal releases, the court indicated that this rule does not apply to releases signed by minors, who lack the legal capacity to enter into contracts. The court concluded that "a minor child injured because of [another's] negligence is not bound by her contractual waiver of her right to file a lawsuit."

Despite their legal vulnerability, if properly drafted and executed, waivers may help block liability. Moreover, an individual who has signed a waiver may be

less likely to initiate a lawsuit than someone who has not. A waiver may also assist an organization in asserting the legal defense of "assumption of the risk." This defense asserts that the individual proceeded with the activity despite being aware of the risks, and therefore should not be permitted to receive damages. An organization should consider a participant waiver in any event where the nonprofit can identify the persons participating in the activity prior to the event. However, often such waivers do not absolve the nonprofit from liability for injuries directly caused by its negligence. Furthermore, waivers are not an appropriate substitute for the careful supervision of activities involving minors or other vulnerable populations.

The validity of a waiver may depend on when the person executed it. Those executed before any actual damages occur are more tenuous than those executed after an injury has occurred (commonly referred to as "releases"). Waivers written before any damages actually occur generally seek to establish that the individual recognizes the risks involved in a forthcoming activity and voluntarily consents to accept the consequences of those risks in exchange for the opportunity to participate. The circumstances of each case determine whether a court will enforce such a "before the fact" waiver. If the individual has no practical choice but to sign the waiver, it is unlikely that the court will uphold it.

Waivers executed after an injury are on much more solid legal ground because the value of the exchange is less speculative. Claimants often execute such a waiver in conjunction with a settlement arrangement. In either event, consult legal counsel when drafting such agreements. The laws governing waivers varies widely from state to state and some states prohibit their use in certain situations.

Hold Harmless Agreements

A hold harmless agreement is a written contract between two parties that states that one party will assume the risk of legal liability for the other party. A "hold-harmless" agreement is different from a disclaimer or waiver but serves the same function of protecting a nonprofit's assets. Rather than seeking to bar a lawsuit, a hold-harmless agreement obligates one party to pay any costs the other incurs as a result of a claim or lawsuit. A landlord will often include hold harmless language in a lease to protect himself from liability resulting from an event occurring on his property. Funders, including governmental agencies, may also insist that a grantee execute a hold harmless agreement so that a claim will not hold them responsible simply because they provide financial underwriting for an activity.

Many contracts increasingly include hold harmless agreements. For example, a

landlord (public or private) might require such an agreement when the nonprofit is leasing space. To protect your nonprofit, carefully read the language in the agreement and make certain that you are not assuming a disproportionate share of the risk. If you must assume risk, assume it for those things over which you have control. If your agency rents space from a local government for a special event, it is unlikely that you will assume responsibility for the maintenance of the building. However, it is not uncommon for the facility contract to contain a hold harmless agreement transferring liability to your agency for injuries occurring during your event including the failure to perform routine maintenance.

A nonprofit can also use hold harmless agreements to its advantage, especially with vendors and contractors. In these documents, the vendor agrees to hold the nonprofit harmless in the event of an accident arising from the vendor's operations.

Properly drafted by an attorney, a "hold-harmless" agreement may be better than a standard indemnification clause. A hold harmless agreement may obligate the party to pay expenses as they arise rather than requiring indemnification or reimbursing the other party for expenses incurred. Furthermore, the courts presume that the agreement applies to all costs for which the other party is liable including the legal costs of responding to and defending against a claim. Costs would also include the payment of any damages awarded to the claimant.

Because a hold harmless agreement does not foreclose a lawsuit, the ability of the executing party to pay expenses that do arise limits its practical value. A hold harmless agreement from an entity with no assets and no insurance is nearly worthless. For this reason, most hold harmless agreements require proof of insurance coverage. The entity promising to pay must provide proof that it has insurance to cover any claims that may arise. For complete protection, the insurance policy must include coverage for liability assumed under contract. A certificate of insurance verifies that the entity carries insurance with the specified limit and offers possible assurance of payment.

Additional Insured Endorsements

Additional insured endorsements are important contractual risk transfer tools. These endorsements modify the policy's coverage by including the named endorsement holder as an insured. A hold harmless agreement is a separate agreement between the parties, while an additional insured endorsement is a modification of an existing contract between the insurance company, or risk pool, and the insured person or organization. For example, the landlord of the building where you are holding a special event may require that he or she be added as an additional insured under your insurance policy. If the nonprofit

causes an accident that results in a claim, the nonprofit's policy would respond for both the agency and the landlord.

Here again, view this issue in reverse. Nonprofits can minimize potential liability by requiring that the nonprofit be named as an additional insured on the policies of vendors and cosponsors. If the activities of the vendor or cosponsor result in a claim, the vendor's or cosponsor's insurance policies will also protect the organization.

Disclaimers

A "disclaimer" is an express disavowal, repudiation, or limitation of liability by one party to a transaction. Disclaimers differ from waivers in that they are unilateral; the injured party does not explicitly agree to the liability limitation. As such, they are of limited legal value. Their principal functions are to refute assertions about extra duties that a program has taken upon itself and to apprise potential claimants of relevant program limitations.

The disclaimer may indicate, for example, that the sponsor will not provide security personnel for an event. Therefore, the sponsor is not assuming a special duty of care for the safety of event volunteers. Similarly, a clearly posted disclaimer of liability for harm from using athletic equipment that an organization provides for its sports program may counter any assertion that the organization assumes a special duty of care for the safety of the participants. In this sense, a disclaimer is roughly equivalent to an advisory or warning of risks that an individual may choose to accept or avoid. Regardless of legal effect, disclaimers, like waivers, may deter claims.

Indemnification

Many nonprofits seek to protect the personal assets of their volunteers, especially directors and officers, by agreeing to indemnify them. Through indemnification, the nonprofit agrees to pay legal costs, settlements, and judgments on behalf of its volunteers. Most organizations include indemnification provisions for directors and officers in their bylaws.

Indemnification can be an empty promise if the organization does not have enough money to pay those expenses. Many government grants or contracts may not permit an organization to use those funds for indemnification. Therefore, indemnification is only meaningful if the agency has a risk financing mechanism in place (such as a reserve fund, insurance policy, or access to a line or credit).

While the information contained in this document may be helpful as you look at the potential use of risk transfer tools such as waivers and hold harmless agreements in your organization, do not regard this document as a substitute

for the advice of legal counsel. If you are considering the use of contractual risk transfer mechanisms, consult an experienced attorney for advice on your particular circumstances.