

## Errors & Omissions/Directors & Officers Liability Policy

### OVERVIEW OF ISSUE

Errors & Omissions/Directors & Officers Liability Policy (D&O) is a type of insurance coverage for the wrongful acts of the directors and officers of an organization, be it a public, private or not-for-profit one. As a board's primary responsibility is to be the steward of an organization, it may be liable for its performance or non-performance of this fundamental responsibility.

### KEY POINTS

- The definition of wrongful act is at the core of an Errors & Omissions/Directors & Officers Liability insurance policy.

### WHAT IS A WRONGFUL ACT?

- Any actual or alleged error or misstatement or misleading statement;
- Act or omission or neglect or breach of duty;
- Liability imposed by statute;
- Any matter claimed solely by reason of an individual being on the board.

### THINGS TO CONSIDER

#### Key Duties of Directors and Officers

- **Fiduciary Duty:** Directors and Officers owe a fiduciary duty to the organization, meaning that the organization's best interests trump that of its directors and officers.
- **Duty of Care:** Directors and Officers are required to discharge their duties with the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
- **Duty of Obedience:** Directors and Officers are expected to abide by the organization's constitution, by laws, policies as well as statutes that impose legal obligations upon the organization.

#### What do D&O insurance policies usually cover and exclude?

- A D&O liability policy protects the organization's directors and officers against allegations of wrongful acts and provides the defense against these allegations.
- Most D&O policies exclude coverage for:
  - Dishonest, fraudulent, criminal and malicious acts.  
Note: the exclusion however does not apply to a

director or officer who has no knowledge of the act or is not a party to it.

- **Bodily injury and property damage.** These losses can be covered under a Commercial General Liability policy. Note: for HIROC insured organizations, this coverage can be found under Coverages A and B of the Master Policy.
- D&O policies may include three distinct coverages known as sides A, B and C:
  - **Side A:** provides coverage for non-indemnifiable losses, when directors are not indemnified by the organization (which may be prevented from doing so for financial or legal reasons).
  - **Side B:** provides reimbursement to the organization for indemnifiable losses, after the organization has indemnified the director or officer.
  - **Side C:** (also known as Entity coverage) provides coverage for securities claims only.
- D&O policies have evolved over time. For example, they now cover not only the directors and officers but also the organization itself, employees, spouses\*\* and volunteers.

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### Summary of HIROC's D&O Coverage

- The HIROC D&O policy has no annual aggregate limit (i.e. the maximum dollar amount the policy will pay in a year), no sublimit and no deductible.
- Defense costs are in addition to the policy limits.
- Aside from the Named Insured, the HIROC policy includes the following as Additional Insureds:
  - Trustees;
  - Officers;
  - Directors;
  - Members of boards and committees;
  - Former boards and committees members\*;
  - Officers and board members of volunteer and auxiliary organizations;
  - Employees;
  - Lawful spouse\*\* and domestic partner, including same-sex relationships;
  - Heirs and executors;
  - Directors sitting on outside boards at the request of the insured.

\*Former board members, directors and officers would be covered for liability arising from the performance of their duties while they were on the board of the organization.

\*\*Spouses are covered only due to their relationship as spouses of Directors and Officers of an organization and their ownership interest in assets and not for their own acts of negligence.



### REFERENCES

- HIROC. (2021). Composite Healthcare Insurance Policy, Master Policy Number 2021/1
- LaCroix K M. (2017). The D&O Diary.
- Canada Business Corporations Act, Revised Statutes of Canada (1985, c. C-44).