

TOP TAKEAWAYS

Top Things a Director Should Know About Her D&O Policy

1. **How Much Insurance Do I Need?**

There is no exact science to determining the limits of D&O insurance a particular company should maintain. However, reputable commercial insurance brokers and other vendors have developed benchmarking data based on market caps, annual revenues, industry, etc. that provide insight regarding how your company's limits stack up against similar/peer companies. You should ask the individual responsible for placing your D&O insurance for this data and review it to determine where your limits are at versus your peer companies. Ask questions if there are deviations in your limits versus those of your peers.

2. **Who Shares the Insurance Policies With Me?**

D&O insurance often covers all directors, officers and employees, as well as the company. This means that significant claims against the company and employees may deplete the limits available for individual officers and directors. You should determine if there are certain limits available only to directors and officers (often referred to as "Side A" or "Side A DIC" coverage) and whether your coverage contains a "priority of payments" clause that provides that in the event of claims against both the directors/officers and the companies, losses attributable to the directors/officers are entitled to payment before losses of the company.

3. **What is Covered Under the D&O Policy?**

In addition to defense costs and the costs of settlements/judgments arising from shareholder actions, many policies cover attorneys' fees and other expenses related to responding to both formal and informal investigations and subpoenas. You should inquire at what point your coverage is triggered, and what costs associated with such events are covered under your policy. You should also inquire as to whether the policy is a reimbursement policy or whether the insurance company is obligated to pay directly and whether it is a duty to defend policy.

4. **Who are My Insurers?**

Understand who your insurers are for your D&O coverage. Look at their claims paying ability ratings issued by A.M. Best, S&P or other reputable independent ratings services. Ask the individual responsible for procuring your coverage if they have had a conversation with your insurance broker regarding the claims payment philosophy of your insurers, and what those insurers' reputations are in the marketplace when it comes to claims handling procedures. If you are named in an action, you want a carrier that will stand behind you.

5. **What is Not Covered?**

Make sure you understand significant exclusions in your policy (exclusions for major shareholders, M&A activity, etc., are becoming more common). Have your policy reviewed by an outside professional to determine the scope of items that may not be covered under the policy.

6. **How Do I Protect Myself in a Crisis?**

Set up policies and procedures before there is a crisis and don't wait to determine who your counsel and advisors will be until litigation occurs. Also, understand the claim notice requirements under the policy. One of the worst things that can occur is a loss of coverage due to inadequate or untimely notice.

7. **What is Side A Insurance and Why Do I Need It?**

Side A coverage is effectively the last line of defense against a director or officer having to pay their own costs related to a claim. It kicks in when the company is unable to provide indemnification (usually due to bankruptcy or a statutory prohibition on indemnification). Therefore, it is one of the most important coverages for individual directors and officers, as it directly protects against loss of personal assets as a result of claims.

8. **Do I Need Cyber Liability Insurance?**

There is a distinction between D&O insurance and Cyber Liability insurance, although there is some crossover. If the cyber event is the underlying wrongful act in a shareholder claim, your D&O policy will likely cover the claim, but you may need separate Cyber Liability insurance if you are concerned about other claims and risk, such as claims that might be brought by regulators, or coverage for the costs associated with providing breach notices to affected customers, costs associated with providing credit monitoring services, etc.

**For more information**

For more information on Ten Things a Director Should Know About Her D&O Policy, please feel free to contact the moderator directly:

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