

Insurance for Plans and Trustees

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International Foundation
OF EMPLOYEE BENEFIT PLANS 

Introduction

- It is important to understand the various types of insurance available for Plans and Trustees.
Today we'll cover:
 - Overview of fiduciary liability, fidelity bonds and other types of insurance
 - Do you have enough coverage?
 - Understanding the timing of claims
 - Benefit overpayment protection
 - What other benefits does your policy offer?

Anatomy of Insurance Policies

- **Declarations Page**
 - Sets forth key information such as effective date, coverages, limits, sub-limits, and insureds
- **Insuring Agreement/Main Form**
 - Body of insurance policy describing coverages, definitions
 - Definitions can be very important in understanding coverage
- **Endorsements**
 - Term used to describe amendments/changes to the terms in the Insuring Agreement
 - Many important terms are found in endorsements
 - Need to review all endorsements to understand a policy

Anatomy of Insurance Policies

- **Exclusions**
 - Each policy will include a list of exclusions
 - Exclusions are also a key factor in understanding a policy
- **Limitations and Conditions**
 - There are often carved out sub-limits to coverages
 - Understand the reporting process for losses
 - When a policy may be cancelled or non-renewed

Anatomy of Insurance Policies

- Consider and understand the difference between:
 - **First-party coverage**
 - **Third-party coverage**
- We will be discussing this as we review different types of insurance coverage

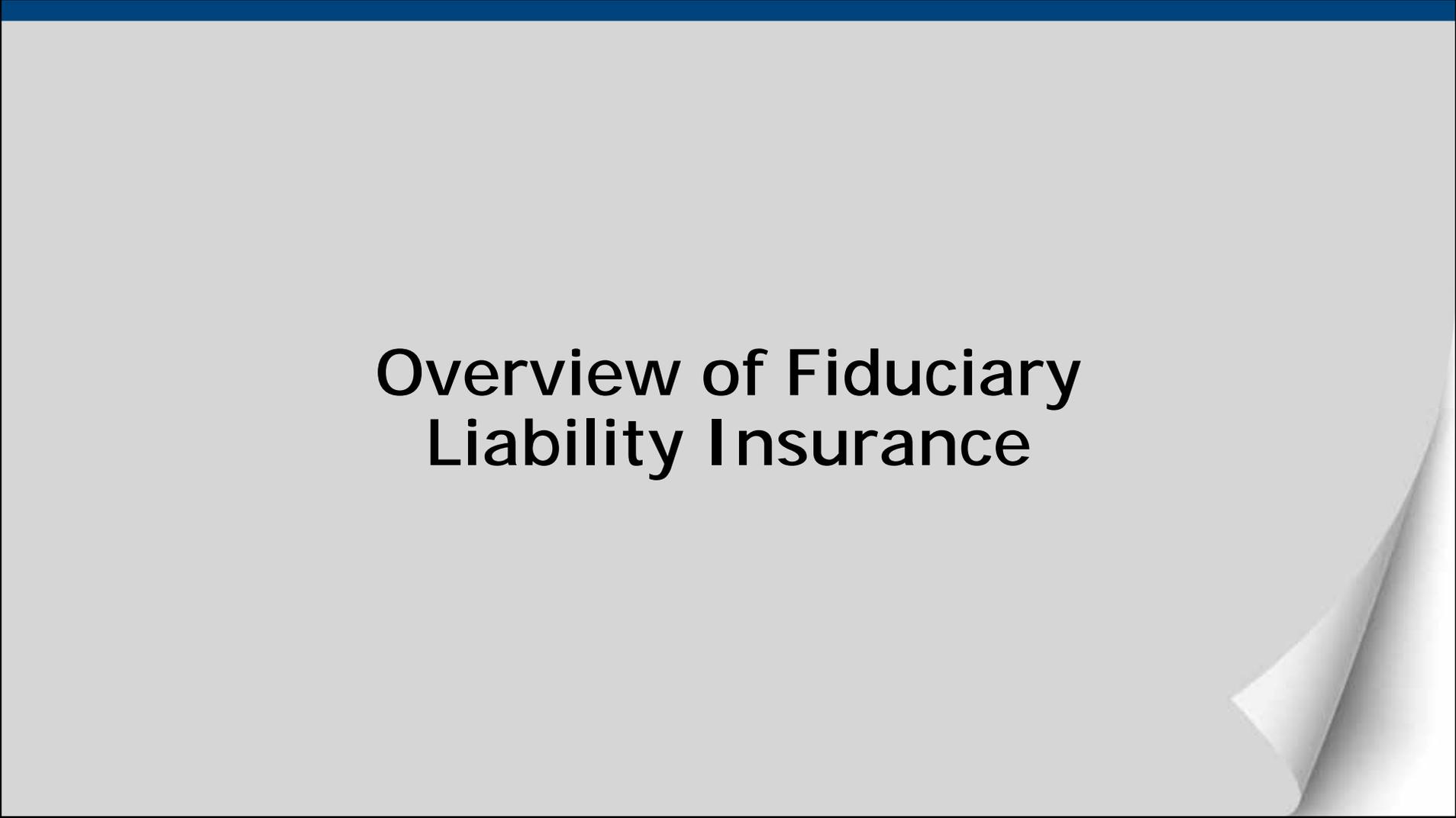
Anatomy of Insurance Policies

- **First-party coverage**

- The first party = Insured
- Provides compensation to or on behalf of the Insured even though a claim has not been made against the Plan or other Insured
- All other coverages must be triggered by a claim

- **Third-party coverage**

- Coverage is triggered by a third party bringing a claim against an Insured alleging a wrongdoing that caused damages
- Provides compensation to or on behalf of the Insured to respond to a claim made against the Plan or other Insured



Overview of Fiduciary Liability Insurance

Fiduciary and Settlor Roles

- Boards of trustees are usually the “Named Fiduciary” of multiemployer plans
- Trustees also have fiduciary duties in their individual capacity
- Boards of trustees are the “Plan Sponsor” of multiemployer plans and therefore have “Settlor” responsibilities
- Fiduciary liability insurance offers coverage for claims that these types of duties and responsibilities were breached

Fiduciary and Settlor Roles

ERISA Section 404 fiduciary duties

- Acting solely in the interest of the participants and beneficiaries
- For the exclusive purpose of:
 - Providing benefits to participants and beneficiaries
 - Defraying reasonable expenses of administering the plan
- Prudent-person standard
- Diversify investments
- Following governing plan documents

Fiduciary and Settlor Roles

- **Settlor Functions**

- Examples of settlor functions include:

- Choosing, changing terminating or eliminating provisions of a Trust or Plan,
- Amending benefits,
- Requiring employee contributions, or changing the level of employee contributions,
- Merging or consolidating with another trust or plan,
- Funding decisions.

Fiduciary Liability Insurance Coverages

Note that key terms will be defined in the policy

- Breach of the responsibilities, obligations or duties imposed upon **Insureds** by an **Employee Benefit Law**
 - ERISA and the Internal Revenue Code primary federal laws
- Negligent act, error or omission by any **Insured** in the **Administration** of any **Plan**

Fiduciary Liability Insurance Exclusions

- Check all exclusions and sub-limits
 - i.e., 502(a)3/equitable relief sub-limits
- Fines, taxes and penalties
 - Most policies exclude fines, taxes and penalties with some givebacks
 - Every policy is different, so compare
 - Full limits or sub-limits
 - Some fines taxes and penalties brought by agencies are more common than others
 - Blanket coverage

Fiduciary Liability Policy Considerations

- Your Fiduciary Policy should **not** have a deductible
 - Check main policy and individual coverages added by endorsement
- Who is defined as an Insured?
 - Are past, present and future trustees and employees included?
 - Are there individuals or organizations listed as named insureds that shouldn't be covered by your policy?
 - Are employer or union officials providing services for the plan that should be covered?

Fiduciary Liability Policy Considerations

- Third-party coverage
 - Triggered by a Claim brought by Third Party alleging breach of fiduciary duty or negligence in plan administration that caused claimed harm
 - Coverage typically includes defense costs and liability to third party if claim is successful or matter settled
- Choice of counsel
 - Choice, panel or appointed?

Fiduciary Liability Policy Considerations

- First-party coverages
 - Investigatory/pre-claim/interview coverage
 - Review limitations to governmental agencies; some limit to DOL and PBGC
 - Voluntary compliance (VCP)
 - Reinstatement of limits?
 - Will this coverage extend to expenses?

Waiver/Elimination of Recourse

- Plan trustees are Insureds under a fiduciary liability policy
- Each trustee has personal fiduciary duties
- If there is a finding that an individual trustee breached fiduciary duties, then an insurance carrier has the right to seek reimbursement of costs paid on behalf of a breaching fiduciary
- *“Waiver of recourse” allows trustees to pay a fee in exchange for an insurance carrier’s waiver of that right. Carrier agrees that it will not seek recovery from an individual trustee in a personal capacity.*
- This fee cannot be paid for by a Fund; can be paid for by an employer or union on behalf of a trustee or by a trustee personally

Fiduciary Claims

Fiduciary Liability Claims— Frequency and Severity

Frequency:
Most
Common

- Benefit claims
- Benefit overpayments
- Investigatory expense or pre-claim

Severity:
High
Dollar

- Breach of fiduciary duty
 - Prohibited transactions
 - Imprudent investments
 - Other ERISA violations
- Class action claims

Benefit Overpayment Protection

Benefit Overpayment Coverage

- **What is a benefit overpayment?**
 - Many reasons benefits can inadvertently be overpaid
 - Benefit calculation error
 - Deceased participant/plan not notified
 - Error in work reporting
 - Trustees have responsibility to oversee proper benefit payments and to determine what to do if there is a benefit overpayment, including considering whether to seek recoupment
 - Sometimes benefits are overpaid due to wrongdoing by participants
 - Fraud/misrepresentation/incorrect information
 - Returning to work and not notifying fund office/suspension of benefits rules

Benefit Overpayment Coverage

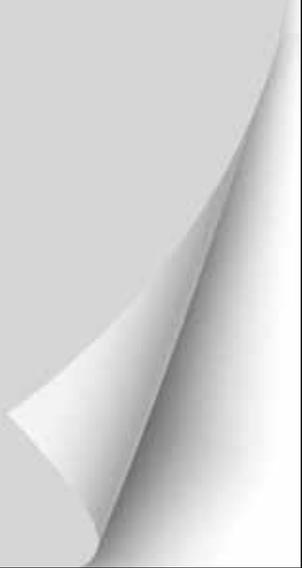
- **Standard changed by SECURE 2.0 in 2022**
 - Confirmed that decision whether to pursue collection on overpayments is a fiduciary act
 - Gave fiduciaries broad discretion to decide not to recoup on inadvertent overpayments given relevant circumstances
 - Imposed significant protections for participants who were inadvertently overpaid
 - Exceptions for “culpable” participants
 - Imposed limits on how a plan may recoup overpayments
 - Created standards for when a plan must be made whole

Benefit Overpayment Coverage

- How will a fiduciary policy respond?
 - Third-party coverage
 - Coverage provided under Wrongful Act if a claim is brought against the insured; counterclaim in response to lawsuit
 - First-party coverage
 - How is coverage triggered?
 - Is the coverage limited in any way?
 - Typically, sub-limited and there can be no claim against the insured
 - Look at coverage triggers



ERISA Fidelity Bond/ Crime Policies



Crime Policies/ERISA Fidelity Bonds

- ERISA requires that plans have a “fidelity bond” to protect against theft of plan assets by insiders
 - Maximum required coverage is \$500,000
 - Cannot have a deductible for employee theft
 - Typically referred to as employee dishonesty policy or bond
 - Coverage can be provided through a crime policy

Other Coverages in Crime Policies/ERISA Fidelity Bonds

- Carriers are offering additional coverages under the same policy for certain cyber breaches such as:
 - Computer fraud
 - Funds transfer fraud
 - Social engineering fraud
 - Forgery or alteration fraud.
- Deductibles allowed for additional coverages
- *Often have low sub-limits*
- First-party coverage
 - Does not require a third-party claim; covers loss to insured
 - These policies typically do not offer third party coverage

Other Types of Insurance

Multiemployer Plans Use Electronic Media and Are Exposed to Risk

- Use computers to store information, manage plan investments, manage benefit claim administration, facilitate communications
- Hold participants' personal and identifying information
- Hold significant assets at different types of financial institutions
- Engage professional service providers
- Multiemployer plans are independent of contributing employers and participants' unions

Cyber Insurance

- Cyber insurance policies help plans to:
 - Manage and transfer risks
 - Protect plan and personal assets.
- Provides an array of services
 - Negotiated partnerships with privacy counsel and incident response vendors
 - Risk management tool
 - Hotline to call when breach occurs
- Cyber breaches may be governed by state, not federal law (HIPAA for health plans is federal law)

First-Party and Third-Party Coverages

- Cyber policies offer coverage for distinct types of potential costs as a result of a cyber event
 - **First-Party:** Expenses that a Plan incurs in responding to a cyber event regardless of circumstances
 - **Third-Party:** Expenses that a Plan incurs in responding to claims by or actions of outside parties relating to a cyber event
- Insured's *fault or responsibility* is not a key factor; the focus is on costs brought about because of a cyber event

If a Cyber Security Breach Affects a Multiemployer Plan:

- A Plan, through its Trustees, may have independent legal obligations to respond to a breach, including notification
- A Plan's operation may be interrupted
- A Plan may suffer a loss of assets
- A Plan's participants' personal information may be compromised
- A Plan, and its Trustees, may be subject to lawsuits or governmental investigations relating to a breach
- A Plan may need to manage publicity relating to a breach.

Plan Service Providers' Cyber Policies

- Multiemployer plans are independent legal entities with independent legal responsibilities
- Plans and their trustees can be sued in their own capacity
- While plans rely heavily on their service providers, plans are independent of them
- Service providers' policies provide coverage for the providers' functions, assets, equipment, responsibilities

Plan Service Providers' Cyber Policies

- Service providers' policies will likely not cover all of their clients' potential costs, such as defense expenses if there is a third-party claim or lawsuit
- Service providers will not be able to obtain enough coverage to cover all of their clients' potential losses
- Service providers are obtaining cyber insurance in the same marketplace; limits on available insurance, coverages

Additional Coverage for Cyber Risks; Excess Coverage

- Given limitations in cyber policies and crime bonds, some carriers are offering separate policies or endorsements for specific cyber risks, such as social engineering
- Explore excess liability cyber policies
 - Stack or tower policies to address gaps in coverage
 - Make sure there is “drop-down” coverage for specific types of events

Directors and Officers Policy (D&O)

- Coverages include:
 - Employment practices liability/3rd party discrimination and harassment liability
 - Personal injury
 - Educator's liability
- Considerations: Training funds and self-administered plans
 - Does your plan have employees?
 - Does your plan provide services, such as training?

Commercial Lines

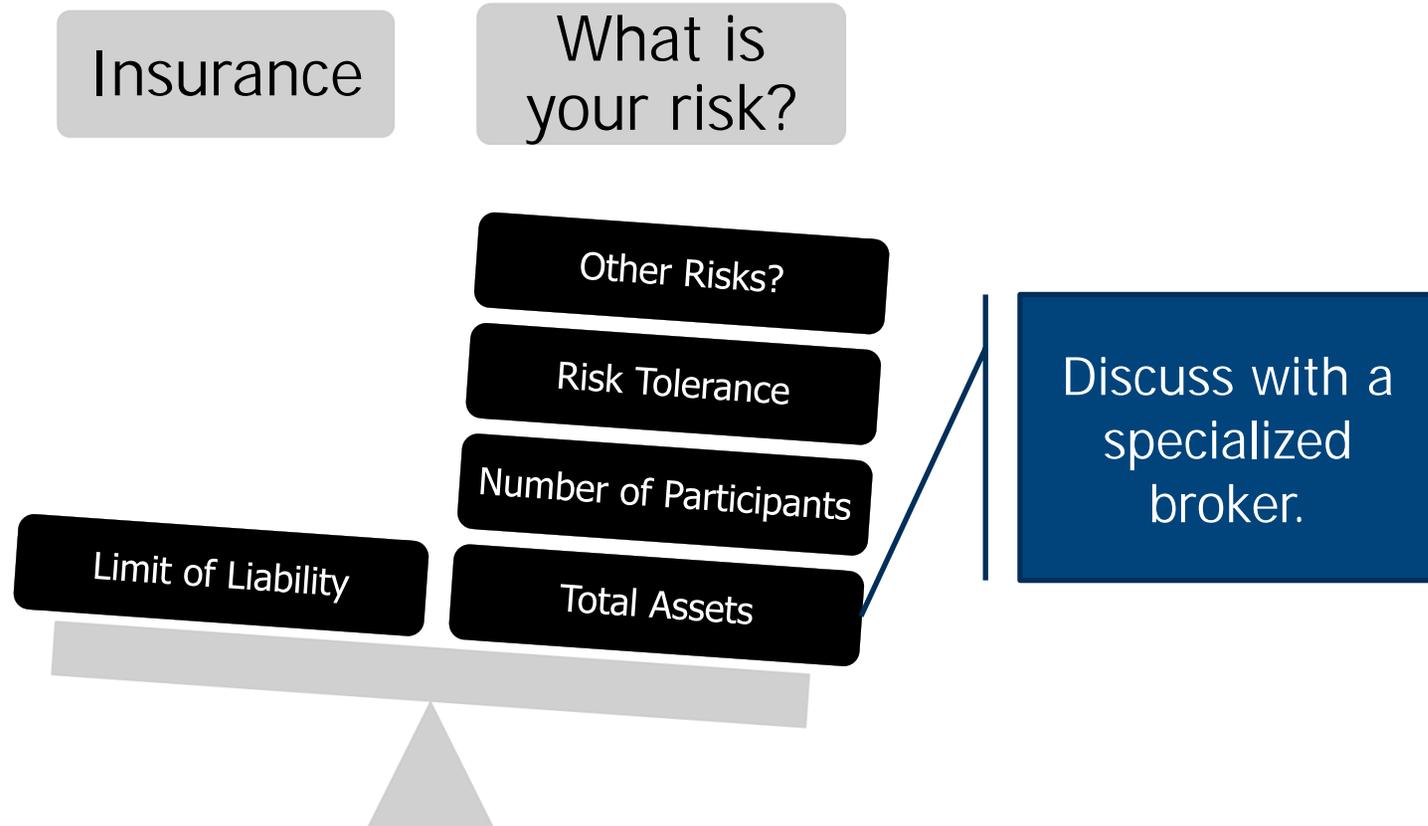
- Considerations
 - Does your plan own property?
 - Buildings, heavy equipment, or automobiles
 - Does your plan have employees?

Commercial Lines

- Coverages
 - Workers' compensation
 - Property
 - Auto insurance
 - General liability
 - Inland marine (equipment)
 - Student premises liability, JATC accident

Do You Have Enough Coverage?

Considerations for Determining Amount of Coverage



Understanding the Timing for Claims

Coverage Is on a “Claims Made” Basis

- A “claim” is the trigger to coverage.
(Not the occurrence of the alleged wrongful act.)
- The “claim” must be made against the insured during the policy period.
- What is a claim?
 - A written demand for relief (money or other)
 - A written request to toll statute of limitations.
 - Proceedings: Arbitration or court
 - Administrative charges

Insured Reporting Obligation to Insurer

- Insured must report “claims,” usually as soon as practicable.
- Check for reporting window.
- Insured usually has the option to report circumstances/potential claims that have not yet resulted in a claim.
- Terms of policy on claims submission must be followed, otherwise coverage may be denied.

Extended Reporting Period

- Carriers typically allow for you to purchase an extended reporting period/tail coverage for “claims-made” policies
 - Time period can vary by carrier and state requirements
- Policies may contain an automatic reporting window after the policy expires



**What Other Benefits
Does Your Policy Offer?**

Other Benefits



Risk management
services



Negotiated
partnerships with
specialists

Key Takeaways

- Insurance Policies offer coverage for different types of risks and different types of losses
- It is important to understand how insurance policies work and the types of risks or losses that are and are not covered
- It is important to work with an insurance broker that understands your risk
- Make sure you work with a knowledgeable professional that can work with you to compare policy language

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