



EMPLOYER PROVIDED MALPRACTICE INSURANCE

This article is designed to inform our clients on issues relevant to mental health professionals.

TOPIC(S) INSIDE THIS ARTICLE

"What you need to know about Employer Provided Malpractice Insurance?"

"Why you should ask your employer for a copy of the insurance policy?"

By obtaining a copy of the policy you will be able to determine:

- **The nature and scope of malpractice insurance coverage**
- **The limits of liability provided**
- **If the coverage is provided by a licensed insurance company or if it is a form of self-insurance**
- **Is the policy an occurrence or claims-made policy form**
- **Who is covered under the policy**
- **Licensing Board Coverage**
- **Conclusion**

Dear APA, Inc. Policyholders,

The Nature and Scope of malpractice insurance coverage

All policies are not equal. You want to pay special attention to the exclusion section of the policy. Most malpractice policies are written on an "all-risk" basis. This means you are covered for everything you do or don't do in your capacity as a Mental Health Care provider EXCEPT what is excluded. Many exclusions are standard, eliminating coverage for matters covered under other types of insurance policies. Other standard exclusions address exposures covered by other insurance policies or matters no insurer wants to cover such as claims arising out of circumstances you knew about prior to buying the policy, criminal or fraudulent acts or practicing without a license. However, there usually are a handful of exclusions that do limit the scope of your malpractice coverage and you need to be aware of these.

The limits of liability provided

Most hospitals and managed care companies require minimum limits of liability of \$1,000,000 per occurrence with an annual aggregate for all claims of \$3,000,000. If your employer provided coverage has lower limits, you may be precluded from doing business with them.

In addition, it is essential to know if the cost of legal defense are included in the limit or are in addition to the limit of liability provided for damages and settlements. Clearly, defense costs provided in addition to the limit are highly preferable since they do not erode the limit available to pay indemnity settlements.

Is the coverage provided by a licensed insurance company or is the risk "self-insured" ?

If your coverage is provided by a traditional insurer, you need to know the size and stability rating (financial condition and claims paying ability) of the insurer. You will also want to know if the insurer is "admitted" (licensed to do business in the state) or if the policy has been issued on a "surplus lines" basis. Admitted insurers are preferable since they are regulated by the state insurance department and policies they issue are covered by state guarantee funds in the event the insurer becomes insolvent. Surplus lines carriers are not regulated and not covered by state guarantee funds if they become insolvent. The best and broadest coverage in the world is no good if the insurer is not around to pay your claim!

If your employer is very large (i.e. a hospital network) it may self-insure by putting money aside to pay claims and choose not to purchase a policy from a traditional insurer.

Coverage provided through a self-insurance mechanism is better than no coverage at all but is clearly less desirable than that offered through a large licensed insurance company.

** If you determine that the coverage provided by your employer is self-insurance you may want to consider buying your own individual policy since inadequate funding by the employer or the insolvency of the employer itself would seriously jeopardize your coverage at a time you will need it most!*

Is the policy a claims-made or an occurrence policy form?

Irrespective of whether your coverage is provided by an admitted insurer, a surplus lines carrier or a self-insured mechanism, you need to know the type of policy that is covering you.

An occurrence policy form will cover you for your work while employed at the company even after you leave the company. However, **occurrence coverage cannot normally be replaced** or improved after the policy expires. This is extremely vexing if your employer is self-insured or if the coverage is issued on a surplus lines basis and the insurer/employer gets into financial trouble.

If the coverage is issued on a claims-made policy form you need to make sure you will be covered after you leave your employer for the work you did while you were there. This can be accomplished by an endorsement most times. A desirable feature of claims-made policies is that they are portable and coverage can be easily replaced by a new insurer who issues a claims-made policy with "prior acts" coverage. Employers who are self-insured and provide you with claims-made coverage enable you to replace coverage with a traditional insurer if they become insolvent. This is not true if the employer provided occurrence coverage.

If the occurrence coverage was issued by a traditional insurer it can't be replaced either but if the insurer was admitted (licensed to do business in your state), the state guarantee fund will protect you in the event of insurer insolvency (each state provides varying levels of coverage in its guarantee fund and you may want to check on the level of protection afforded in your state).

Who is covered under the policy?

It is important to know the number of other insured's covered under the policy because unless there is a provision to provide each insured with his/her own limits of liability (commonly known as a severability clause) your coverage may be reduced or eliminated by the losses of co-workers who also are insured.

Since most policies exclude claims brought against an insured by another insured covered under the same policy, it can be beneficial to know that claims brought against you by these other "insured's" are not going to be covered. Conversely, claims you may bring against your employer or insured co-workers will not be covered by the policy either.

Licensing Board Coverage?

The most frequently utilized feature of malpractice policies we provide is defense coverage for state licensing board investigations. These matters are expensive to defend and if not handled properly can result in the suspension or complete loss of your license. Make sure your employers policy provides you with coverage for defense expenses in these matters!

Conclusion

St. Vincent's Hospital in New York City is a classic example of many physicians losing their malpractice insurance that was employer provided upon the bankruptcy filing of the hospital network. The coverage provided by St. Vincent's to its employees was a complicated combination of self-insurance and excess liability coverage had issued on an occurrence policy form.

Virtually all the doctors affected could not replace coverage. Fortunately, the court handling the bankruptcy case issued various rulings that mitigated part of the malpractice liability exposure for those doctors.

The lesson to be learned here is not to rely on employer provided coverage. If you do, you can sleep a lot better if that coverage was issued on a claim-made basis by an admitted insurance company with a strong financial rating. Remember to address the extended reporting provision for filing claims if you leave that employer unless you replace coverage with the same retroactive date with another insurer.

If the coverage was issued on an occurrence basis by an admitted insurer, you can rely on state insurance guarantee funds to replace a good part of your coverage in the event of insurer insolvency.

With coverage issued on a surplus lines basis, you are at risk for insurer insolvency since no state guarantee fund will apply. If the coverage provided was on an occurrence basis and issued by a surplus lines insurer you will lose all coverage in the event of insurer insolvency. However, most claims-made policies issued by a surplus lines insurer can be replaced by getting "prior acts" coverage from another insurer.

While employer provided malpractice insurance is a desirable benefit, if it is offered through a self-funded insurance program or by a small offshore captive insurer you run a greater risk of losing all your coverage in the event of employer insolvency. If you can afford your own policy, consider that money well spent. Remember that it doesn't matter who provides your malpractice insurance until it does!