



Demystifying Directors & Officers Insurance and Personal Asset Protection

Serving on a nonprofit or for-profit board can be rewarding in many ways. Offering your unique expertise and perspective as a guide toward growth and sustainability is highly valued by organizations and companies of all sizes. In all the excitement around joining a new board, many people don't stop to consider the risks of the role. Unfortunately, personal assets can be exposed when a board doesn't carry enough Directors and Officers (D&O) Liability insurance to cover a lawsuit against the Board directors.

In this article, we will summarize what D&O coverage is, why it is essential to know what is covered and what is at stake as well as provide questions to ask to minimize personal liability.

What does D&O insurance cover?

D&O coverage is meant to protect both individual board members and the company they serve for a variety of claims or "wrongful acts." D&O policies often define this term broadly and, in most instances, a wrongful act is considered to be any actual or alleged act, error, omission, misstatement, misleading statement, breach of duty, breach of trust, neglect and breach of warranty of authority.

How does D&O insurance purchased by an organization relate to a Board Member's personal assets?

When a board member is asked what D&O limit of insurance an organization should carry, they typically respond, "as much as we can afford!", and that is primarily driven by the thought that their personal assets could be at risk when joining a board. While this is true, it is not a statement that applies across every potential claim scenario. D&O insurance policies contain multiple insuring agreements, which specify the scope of coverage afforded by a policy. Each insuring agreement outlines the promise of the insurer to protect the policyholder (the insured) in accordance with the terms and conditions of the policy.

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Side A insures individual directors and officers against losses that the organization is not legally or financially able to indemnify (also known as non-indemnifiable claims). In the event a company does not pay defense costs or fund indemnification, the policy would step in and pay those costs. This is the insuring agreement that could affect a board member's personal assets. Most often, we see this in bankruptcy or dissolving of a company.

Side B, also known as corporate reimbursement coverage, is the second insuring agreement of a D&O policy. Side B reimburses organizations for expenses they incur when defending directors and officers in accordance with their indemnification obligations (also known as indemnifiable claims).

Often, organizations are named in lawsuits alongside their directors and officers, leaving the entity exposed to serious legal action. **Side C** coverage, sometimes referred to as entity coverage, is the third insuring agreement of a D&O policy. This insures organizations for claims made directly against the organization by providing entity asset protections and coverage for defense costs.

For boards that want extra protection for Side A, additional coverage is available and can be purchased. Your G2 insurance advisor can provide options that best suit the organization you serve on based on benchmarking data and best practices.

Within the nonprofit sector, employment related claims (Employment Practices Liability or EPLI) are usually included as another insuring agreement within D&O policies. This covers claims such as wrongful termination, sexual harassment, and even ADA discrimination claims brought by employees or third parties. The overwhelming majority of claims that nonprofits will experience are Employment Practices related, not D&O related.

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Case Study

Bankruptcy or dissolution is extremely rare in the Nonprofit context and usually comes about due to the nonprofit not being a true nonprofit under IRS rules or some other egregious behavior that falls foul of regulators – for example the National Rifle Association. In the commercial context, G2 advised an investment firm that was the subject of SEC enforcement action due to the fraudulent behavior of one individual which led to its bankruptcy and a slew of claims against the company and its directors. The directors were extremely grateful to have the benefit of a broadly worded insurance policy with Side A coverage to cover the legal costs of defending these claims that, without Side A coverage, they would have been left to their own resources to defend.

Best practices for Board Members

It is never too late to do your due diligence, whether it is before you join a board, or while you are currently serving on one. Below are some prompts you can ask to evaluate the health of the organization and their corresponding insurance coverage.

- 1) Review the audited financial statements of the organization. What is their financial health? Have there been any major changes you should be aware of?
- 2) What is the limit of insurance carried for D&O? Does it include Employment Practices Liability? If so, is the limit shared with D&O or do they each have their own limit?
- 3) Have there been any D&O or EPLI claims in the past 5-7 years? Ask for details and the dollar amounts paid. Don't be afraid to drill down on what happened. You may spot a trend or red flag that could make you re-think your board service.
- 4) If in a particularly risky industry, review the indemnification provisions of the articles of incorporation and bylaws and if not satisfied enter into a separate indemnification agreement with the company or a guarantor.

Final insights from our specialists

As industry specialists handling D&O for nonprofit organizations and high-net worth individuals and families, G2 is a client-focused insurance firm, providing a wealth of expertise and a personalized customer experience for commercial and personal risk management.



Lauren Erickson, G2's Risk Management Advisor focused on nonprofits, recommends ensuring the organization's D&O policy is with an insurer that specializes in nonprofit organizations as those companies tend to offer many free services and trainings that can help lower the overall cost of risk. If you oversee insurance and risk management at your organization, please contact Lauren at 415.426.6656 or lerickson@G2insurance.com.



Shirley Gordon, G2's Director of Personal Risk Management, recommends looking at adding excess D&O coverage to your own personal insurance to act as a buffer above a nonprofit's D&O policy in the event it is insufficient. If you are a Board Member wondering if you have enough coverage to protect your personal assets, please contact Shirley at 415.426.6605 or sgordon@G2insurance.com.

To find out if your current risks are adequately covered, please contact Lauren or Shirley for a policy review.

