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GUIDE TO PROFESSIONAL LIABILITY INSURANCE

HRPA | OFFICE OF THE REGISTRAR

Guide to Professional Liability Insurance

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GUIDE TO PROFESSIONAL LIABILITY INSURANCE

From June 1, 2009, all members of HRPAs who provide HR services as independent practitioners, whether full-time or part-time are required to carry professional liability insurance. This obligation applies to members who may have a full-time position with a company but perform very occasional consulting work for other parties, even if that consulting work is done without any payment or compensation.

What is professional liability insurance?

Professional Liability insurance is intended to cover claims made against a professional person for the losses suffered by a third party because of the failure on the part of the professional to meet the expected standards of performance of the professional's services.

The insurance is also expected to pay for the defense of the professional in dealing with the allegations of any third party, even if the allegations are groundless.

This type of insurance is also called 'malpractice liability' or 'errors and omissions' insurance. The terms are generally regarded as synonymous by the insurance industry.

What is the professional liability insurance requirement for members of HRPAs?

The requirement for independent practitioners to carry professional liability insurances is part of the *HRPA Rules of Professional Conduct* that all members of HRPAs must agree to abide by as a condition of membership in the Association.

The HRPAs Rules of Professional Conduct state: *"A member in independent practice shall have full professional liability. It is prohibited to insert in a contract of professional services any clause excluding, directly or indirectly, in whole or in part, his or her personal civil liability. The member may not sign a contract containing such a clause."* The HRPAs Rules of Professional Conduct also state: *"A member in independent practice shall have professional liability insurance adequate for their situation."* The Rules of Professional Conduct, however, leave it to the member to use their judgment in determining what "full" and "adequate" mean in his or her context.

HRPA's public register has a field which indicates whether you have obtained professional liability insurance and are thus authorized to offer HR services in independent practice. For this field to indicate that you have professional liability insurance, you must:

1. Inform HRPAs of the name of the broker and the policy number by filling out the professional liability insurance page in your HRPAs member profile which is accessible online
2. Forward proof of your insurance coverage to HRPAs (information sent to HRPAs directly from the broker/insurer is preferred)
3. Ask your broker/insurer to notify HRPAs of any cancellation of the insurance or changes in the terms of the insurance policy
4. Give HRPAs permission to verify your insurance coverage with your broker/insurer

Why does HRPA require its members in independent practice to carry professional liability insurance?

The reason HRPA requires its members in independent practice to carry professional liability insurance is because it is in the public interest to do so. Indeed, were there no impact on the public of not carrying professional liability insurance, HRPA would not require its members to carry professional liability insurance. But in this case it is also in the member's interest to carry professional liability insurance. All professionals in independent practice have some exposure to claims of liability, whether these claims are ultimately found to be groundless or not. The cost of defending oneself against such claims, let alone the cost of any settlement, can be devastating to independent practitioners.

The HR profession has achieved the privilege of self-regulation as a result of the passage of the *Registered Human Resources Professionals (RHPP) Act, 2013*. This privilege also comes with obligations which include a requirement in common with nearly all other professional bodies in Ontario that there must be a source of protection for a member of the public who may suffer a loss because of some failure by the professional in the performance of services.

Professional regulatory bodies require their members to carry professional liability insurance — because it is in the public interest to do so. Regulators must ensure that there is a financial resource that is independent of the member to meet the costs of any damages that may be awarded against the member in court. In a loss situation the member may not have the resources to pay for the legal costs of an action nor for any damages. HR professionals registered with HPPA must meet, and be seen to meet, the highest standards in order to protect the public interest.

Does the professional liability insurance need to be bought from any specific insurance company?

No, members do not need to buy their coverage from any specific insurer but it is recommended that the member engage the services of an insurance broker with expert knowledge in the handling of professional liability insurance and that it be confirmed that the insurer is an 'A' rated company, licensed to do business in Canada. The ratings of insurers are issued by the A. M. Best Company, the recognized rating body for insurers in North America.

What does “full” and “adequate” insurance mean? How do I know that the coverage I have is “full” and “adequate?”

Some professional regulatory bodies are more prescriptive in matters of professional liability insurance. HRPA has taken a less prescriptive approach but expects its members to make choices based on their specific circumstances. The limit purchased should take into account what the member considers could be a 'worst case' scenario for financial loss of a client or other party in the event of a professional failure. The adequacy of the coverage is addressed below.

What should I check for when considering the purchase of a professional liability insurance policy?

í **Is the policy on a 'Claims Made' form?**

This is most likely to be the case. 'Claims Made' policies only cover claims made against the insured and reported to the insurance company while the policy is in force. The policy will also exclude any claim of which the insured had any knowledge or information prior to the effective date of the policy. Be very careful if you plan to switch from one insurance company to another and discuss this with your insurance broker before completing the change.

í **Does the insurance coverage apply to everything I do in my practice?**

Most policies will only cover your services in your capacity as a human resources professional. If you provide additional services beyond this then you may need additional insurance coverage.

í **Is the coverage for Canada only?**

This may be so and can be a concern if your practice involves clients or work in another country. You should discuss this with your insurance broker.

í **Is the limit adequate for your practice?**

As mentioned above, the limit purchased should take into account what you consider could be a 'worst case' scenario for financial loss of a client or other party in the event of a professional failure. Limits can range from \$100,000 per claim to \$2,000,000 or higher. The policy will also state that there is an 'Aggregate Limit' and this means the limit that applies to all claims in any one policy year. For example a limit of \$1,000,000 per claim may also be subject to an aggregate limit of \$2,000,000 for all claims during the policy period.

í **Are defense costs included within the limit?**

If this is the case, the defense costs in a claim situation can be very high and will erode the amount of limit available to pay the damages if any are awarded against you. You may want to consider buying a higher limit if defense costs are included.

í **Does the deductible apply to defense costs as well as settlement payments?**

If this is the case then you should be prepared to pay the deductible as part of the cost for the handling of the claim. It is recommended that the deductible not be higher than an amount you can afford without significantly affecting your business.

í **Is there a retroactive exclusion date in the policy?**

If this is the case then any claims that may be made against you for any work done prior to the retroactive date will be excluded. Policies for professional liability insurance are written on a claims-made basis, which means that a lawsuit made today could be for services completed years ago. It is important that your policy provides coverage for services provided in the past. If this exclusion is a concern then you should discuss this with your insurance broker.

í **Is there an option for coverage after I retire?**

If retirement is a possibility for you within a reasonable period of time then you should discuss this with your insurance broker.

The insurer may provide for a 'Discovery Period'. A discovery period is a provision that allows the insured a certain period of time after termination of the policy to report losses that occurred during the policy period.

Who does the insurance broker work for? Is the broker working for me or acting in the interest of the insurance company? How do I know that I am getting good advice?

The role of an insurance broker is to serve the interests of his clients. The broker's is there to work for you and provide the best advice and guidance for you in making the decision of what insurance coverage to purchase and on what terms and conditions.

In selecting the right insurance broker you may consider:

- í Contacting the HRPAs Affinity Provider for professional liability insurance, PROLINK at: Leona Petersen, Account Manager, Associations and Affinity Groups, T: 416 644 7706 and E: LeonaP@prolink.insure.
- í Contacting some peers in your profession and seeking referrals to a broker that they have found appropriate
- í Contacting insurance brokers of your choice and asking for their qualifications in handling professional liability insurance and asking for client references that you can check
- í Researching the internet for insurance brokers specializing in professional liability insurance and again requesting independent client references that you can check

An indication of good advice would be the prompt and full answering of the check items above plus more detailed information about the coverage and the options available with recommendations.

What is normally covered by a professional liability insurance policy issued to an HRPAs member?

THE FOLLOWING INFORMATION IS INTENDED TO BE HELPFUL TO THE READER BUT SHOULD NOT BE RELIED UPON AS ACCURATE FOR YOUR OWN CIRCUMSTANCE BECAUSE THE POLICIES ISSUED BY DIFFERENT INSURERS CAN VARY – **YOU MUST CHECK WITH YOUR INSURANCE PROVIDER TO OBTAIN ACCURATE INFORMATION ABOUT YOUR PARTICULAR PROFESSIONAL LIABILITY INSURANCE COVERAGE**

- í 'Claims Made' coverage applies to claims that are presented to the insurer during the policy period and arising out of an error, omission or negligent act which took place after the Retroactive Exclusion date of the policy
- í The coverage only applies professional services rendered in the capacity of a human resources professional.
- í A claim may mean
 - any written or oral monetary demand
 - any written or oral allegations
 received by the insured in relation to the rendering of services in the capacity of a human resources professional and resulting from a single fault, error, omission or negligent act.
- í Defence of claims is insured
- í The coverage may be limited to suits or proceedings first brought against the insured within Canada
- í Exclusions common to many policies include:
 - dishonest or fraudulent acts
 - fines, penalties
 - bodily injury claims (this is more commonly insured under a Commercial General Liability Policy)
 - libel and slander
 - services outside Canada
 - claims where the insured had knowledge of the circumstances prior to the effective date of the policy
- í It should be remembered that your application form for the insurance must be entirely complete and accurate when submitted to the insurer as the insurer is relying upon its accuracy in deciding whether to provide coverage and on what terms. Any mistake in completing the application form, even innocent mistakes, can lead to the policy being declared void.

What circumstances could give rise to a professional liability claim against an HRP member?

The application of Common Law in Canada imposes standards upon the professional where performance is required to meet a much higher level than that expected of an ordinary person. Where the professional fails to meet the expected standard then the professional can be held liable for the losses sustained through the failure.

This environment creates a level of exposure for the HR Professional where any loss situation can give rise to a claim.

The HRPA Rules of Professional Conduct and within the Rules, The Code of Ethics, also set out standards of professional performance that can add to the environment where a failure can lead to a claim where the client or other party suffers a loss. Members, being familiar with the Rules of Professional Conduct, will understand there is any number of situations where a failure or just an alleged failure could give rise to a claim. Some specific claim situations can arise from the following:

- í Wrongful selection of a candidate
- í Lack of a thorough investigation of a candidate
- í Bad advice on human resources administration programs
- í Lack of legal search on employment or pay equity programs
- í Loss of key employees due to a deficient compensation program
- í In a third party dispute resolution, the situation may be worsened due to mishandling
- í Following union negotiations, party could claim financial losses due to mishandling on the part of the professional

What should I do about professional liability insurance when I retire completely from acting as an HR Professional?

The HRPA By-laws state: *“The status of retired denotes that the members are no longer active in professional practice.”* Members who are given retired status must not practice HR. A member who has left employment in one organization should not think of himself or herself as retired if he or she intends to offer professional services, even if only on an occasional basis or without payment or compensation.

If you have fully retired from the practice of HR you could still be subject to a claim arising from any of the work that you have done in the past when a third party decides they have suffered a loss from that earlier work and decides to make a claim. As mentioned earlier, the professional liability policies available in the insurance marketplace are almost always provided on a ‘Claims Made’ form which means that only claims reported to the insurance company while the policy is in force will be covered. If you do not maintain your professional liability insurance policy after retirement and you are unfortunate enough to receive a claim after the expiry of your policy then you have no coverage. If you have knowledge of any situation or circumstance that you believe could possibly result in a claim – report it immediately to your insurer and certainly before the policy expires.

It is therefore recommended that you do maintain coverage after retirement for a period of time adequate to provide for enough time to pass when a claim for your past work will not be likely to arise. Some insurers have a special provision for retirement coverage called a ‘Discovery Period’ where the premiums are reduced.

What should I do in the event that I receive notice that someone is holding me responsible in whole or part for some loss they have sustained – or if I discover something that I have done or not done that I believe could give rise to a claim against me?

- í Avoid giving any comments or response other than to state that this is something your legal advisor needs to be involved with immediately and the response will be given from your advisor
- í Do not admit any liability
- í Be aware that any phone conversation may be recorded and just give the response explained above
- í Report any claims or possible claims immediately to your insurer, they can sometimes resolve the problem
- í Ensure your file is complete and accurate
- í Cooperate with the insurer's claim staff – it's their job to take care of your defense and deal with any settlements, subject of course to the limits and terms of the policy.



Professional Liability Insurance Coverage Information Form

General Instructions:

Please complete this form and return it to HRP. Proof of insurance coverage is also required. This may be sent along with this form (e.g., a copy of your policy) or you may ask your insurance provider to send proof of coverage directly to HRP by mail, fax or email:

HRPA Office of the Registrar
150 Bloor St. W., Suite 200
Toronto, ON M5S 2X9

Email: registrar@hrpa.ca
Fax: 416.923.8956
Tel: 416.923.2324 or 1.800.387.1311

Member Information:

Mr. Ms Mrs. Dr. Membership Number: _____

First Name: _____ Last Name: _____

Email: _____

Policy Information

In order to be authorized for independent practice, you must:

- Provide proof of insurance to HRP (e.g., a copy of your insurance certificate), or a document sent directly to HRP from your insurance provider)
- Request that your provider inform HRP of any premature cancellation or non-renewal of the policy

The HRP Rules of Professional Conduct require members in independent practice to have professional liability insurance adequate for their situation. It is prohibited to insert any clause excluding, directly or indirectly, in whole or in part, the member's personal civil liability in a contract of professional services.

Do you provide HR services as independent practitioner on a full-time, part-time, infrequent or volunteer basis? Yes No

Name of Brokerage: _____

Policy Number: _____ Policy Expiry Date: _____

Broker First Name: _____ Broker Last Name: _____

Broker Tel: _____ Broker Email: _____

Attestation

I authorize HRP to verify my insurance coverage with the provider noted above. I confirm and attest that the information I have provided with respect to my professional liability insurance coverage is complete and accurate. I understand that, as an independent practitioner, professional liability insurance coverage is required by the HRP Rules of Professional Conduct and that to practice independently without such insurance, or to provide false or misleading information related to my professional liability insurance coverage, is a breach of the Rules of Professional Conduct and may lead to allegations of professional misconduct.

Member Signature

Date