CLAIMS MADE BEST PRACTICES

Complying with the reporting requirements in a claims made policy can sometimes feel like navigating through a minefield. Claims made policies contain a number of traps for the unwary that could leave you with no insurance coverage, so the importance of having someone in your organization trained on these policies cannot be overstated.

WHAT IS A CLAIMS MADE POLICY?

There are two basic types of insurance policies: occurrence-based policies and claims made policies. Common occurrence-based policies include commercial auto, general liability, and property policies. These policies cover claims that arise out of damage or injury that took place during the policy period, regardless of when the claim is actually asserted. For example, if a customer slips and falls on your premises in 2016 but does not file a lawsuit until 2018, your 2016 general liability policy would respond.

CLAIMS MADE POLICIES

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Claims made policies operate very differently. Claims made policies cover only those claims made during the policy period, regardless of when the injury occurred (although most policies require the injury to occur after a "retroactive date" stated in the policy). For example, if an employee files a complaint with the EEOC in 2018 alleging that he was discriminated against by your company back in 2017, your 2018 employment practices liability policy would respond because that was when the claim was made. Common claims made policies include employment practices liability, directors and officers, errors and omissions, product recall, cyber, professional liability, and fiduciary policies.

WHAT ARE THE BIGGEST PITFALLS ASSOCIATED WITH CLAIMS MADE POLICIES?

1. Failing to recognize that a claim has been made. Recognizing a claim on an occurrence-based policy is fairly easy. If your building is damaged in a storm or your employee is in an auto accident while on duty, you have a claim. Recognizing a claim on a claims made policy is not as straightforward. Depending on the wording of your policy, all of the following can constitute a claim that must be reported to the insurer as soon as practicable:

- Any written demand,
- Service of a complaint or similar pleading,
- Any arbitration, mediation or other similar dispute resolution proceeding,
- Any criminal proceeding commenced by return of an indictment,
- Any administrative or regulatory proceeding commenced by the filing of a notice of charge, written request to interview, formal investigative order or similar document (e.g. an EEOC, civil rights commission, or similar notice),
- A written request to toll or waive a statute of limitations,
- A subpoena

2. Failing to report a claim on time. If a claim is made against your company in any of the above forms, you must notify your insurer as soon as practicable. If you fail to do so, the insurer can deny coverage. The following scenario illustrates a common coverage issue with claims made policies. An officer of your company is served with a notice of charge from the EEOC on December 23rd. The officer fails to act on the notice prior to the holidays, and your insurance coverage moves to different carrier on January 1st. After the New Year holiday, the officer reports the claim to the previous carrier. The previous carrier will deny the claim because it was not reported during the policy period. The new carrier will also deny the claim because the claim was not first made during the policy period. Your company now has no insurance coverage for this claim.

WHAT CAN YOU DO TO PROTECT YOUR COMPANY?

1. Read your policy, and pay close attention to the definition of a "claim."
2. Train your employees to recognize and report claims immediately. Training on claims made policies is available in the Cottingham & Butler Risk Management Center.
3. Communicate with your Cottingham & Butler team if you are unsure of whether or not an event constitutes a claim.
4. Report a notice of circumstances that may give rise to a claim. This type of notice provides a safe harbor for reporting an event that may turn into a claim in the future. This may protect you in the event that a claim arises after expiration of the policy because you have already put the insurer on notice.