

Consultants



David M. Governo



Gregory V. Janian

PROFESSIONAL LIABILITY INSURANCE

WHY INDUSTRIAL HYGIENISTS NEED IT

BY DAVID M. GOVERNO AND
GREGORY V. JANIAN

Whether you are an independent contractor or an employee, insurance for your potential liability is an essential aspect of a solid financial foundation. An overview of liability insurance was presented in the article "Liability Insurance: What Is It and Do I Have Enough of It?" in the February 2005 issue of *The Synergist* (pp. 39–42). Commercial general liability policies were analyzed from the perspective of business owners' liability, rather than from

the perspective of the personal liability of industrial hygienists working within the company. This article discusses the importance of professional liability insurance to industrial hygienists. In particular, it highlights the liability that industrial hygiene professionals without such coverage may face.

WHAT IS PROFESSIONAL LIABILITY INSURANCE?

Professional liability insurance, also known as errors and omissions or malpractice insurance, insures a person or entity against claims brought by a third party as a result of negligence in the rendering of, or the failure to render, professional services. E&O policies have become necessary because most commercial general liability policies specifically exclude claims for injuries or damages resulting from the rendering of professional services. The particular "professional services" that are excluded may be specifically defined in a CGL policy, but generally consist of any service requiring specialized skill or training.

People who perform professional services are typically sued for failing to perform with a degree of knowledge or skill that is comparable to professionals within the industry. Originally, professional liability insurance policies were designed for professions that required an advanced degree, such as doctors, lawyers and architects. However, exclusions for professional services in these policies have become so broad that many other professionals, including insurance brokers, software designers, mental health counselors and environmental consultants, require separate policies to cover professional malpractice. Industrial hygienists clearly fall under the category of professionals who provide a service requiring specialized skill and training. Thus, if their CGL policy contains the standard

exclusion for professional services, industrial hygienists must obtain an E&O policy to be fully insured.

EMPLOYER/EMPLOYEE SETTING

It is a common misperception among professional employees that if something happens on the job they will be covered by their employer's insurance policy. While this is generally true, it is not a steadfast rule. Today it is common practice for lawsuits to be brought against the specific employee who performed the work, as well as the employee's company.

Industrial hygienists and the companies employing them can take steps to protect themselves from uninsured claims. Working for a company with only a CGL policy, which excludes coverage for professional services, leaves industrial hygienists and their employers with a substantial gap in insurance coverage. Typically, employees sued for professional negligence are not abandoned to fend for themselves, as their companies are also liable (jointly and severally) for their negligence and would likely provide a defense. To determine whether you have insurance coverage to protect yourself from this type of lawsuit, ask your company to see its insurance policies. If there is no E&O policy, review the CGL policy in detail and make sure that there is no exclusion for professional services. You have a right to know about your level of legal protection in the event of a claim, and your company should be willing to share this information with you.

If the company does not carry coverage for professional services, you can obtain some protection by entering into a written employment agreement that obligates the company to defend and indemnify you in the event of a lawsuit brought against you for professional services rendered within the scope of your employment. Although this option is not as secure as adequate insurance coverage, as its vitality is dependent on the financial strength and good will of the company, it is exponentially better than working without any protection.

INDEPENDENT CONTRACTORS

Industrial hygienists working as independent contractors, without both a CGL policy and an E&O policy, must assume that they have no insurance protection for lawsuits resulting from the work they performed for a company. Many industrial hygienists mistakenly believe that operating as a corporation or limited liability company will shield them from personal liability in the event of a lawsuit. While this is true with respect to the "debts and obligations" of the company and even certain lawsuits such as "slip and falls," operating as a corporation will not shield claims for negligent professional services. Complete insurance coverage can be cost prohibitive, but the alternative is to risk a lawsuit that can send an individual into financial trouble, if not bankruptcy. Defending yourself from even a frivolous case is expensive, and unlike many

Consultants

plaintiffs' attorneys who work on a contingency fee, defense attorneys usually bill by the hour and require a substantial retainer.

If insurance coverage is out of reach as a result of its high cost, there is no real protection in the event that you are sued by a client for professional malpractice. However, if you are retained to perform work for a company with insurance, consider discussing the potential for the company to list you as an additional insured under its E&O policy. Whether or not this solution is viable depends on the circumstances, but asking is certainly better than simply hoping for the best.

Finally, if you are working for yourself, speak directly with an insurance broker who understands your business. Some professional liability insurance brokers specialize in this field and can guide you through the policies available for the type of work you do. If you do buy insurance, maintain a regular flow of communication with your broker, particularly whenever your activities and business operations change. While your policy may cover the work you are doing today, it may not necessarily cover the work you do in the future. A good insurance broker will understand your business and give you

the coverage and peace of mind necessary to keep you and your personal assets shielded from any liability that your professional advice can cause. 

Governo and Janian help clients prevent and resolve their legal problems, including environmental and indoor air quality claims. Governo Law Firm LLC, Boston, provides a full range of business planning, risk management and litigation services. Governo can be reached at (617) 737-9045 or dgoverno@governo.com.

The authors extend special thanks to Henry Cifuentes at Hays Affinity Solutions, the broker for AIHA's liability insurance affinity program, for his research assistance and for his review of this article.

AIHA Partners to Provide Professional Liability Insurance

AIHA has contracted with Hays Affinity Solutions to provide liability insurance coverage for AIHA members. The AIHA endorsed professional liability insurance policy (through Hays) is intended to cover the industrial hygienist's errors and omissions exposures when the insured is performing in a professional capacity.

The AIHA-endorsed professional liability policy, offered through Hays, includes:

- Optional mold insurance coverage (100K or 250K) on insurance policies with at least \$1 million limit of liability
- Insurance policy wording that is specifically tailored to AIHA members
- Carrier will pay on "behalf of insured"—less any applicable deductible—instead of reimbursing insured (i.e., legal defense costs)
- Carrier has a "duty to defend"
- Pollution and asbestos insurance coverage included in standard policy (see policy for details)
- Insurance coverage for prior acts available
- Insurance coverage provided by "A" rated carrier—Lloyds of London

For more information about the insurance or Hays, please go to the Hays Affinity Solutions Web site at <http://aiha.haysaffinity.com/>.

Hygiene Tech

1/4 p.—