BEST PRACTICES FOR PROTECTING YOUR COMPANY WITH A SUCCESSFUL INSURANCE RENEWAL

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Many in-house attorneys and risk managers follow the same ritual each year when renewing their company's insurance policies: they look at a few insurance proposals, compare premiums, and then put their renewal policies in a file, taking comfort in the belief that their company is protected for another year. This ritual can lead to unwelcome surprises when a claim is made against the company or the company suffers a loss and the in-house attorney or risk manager learns for the first time that the company's policies do not cover the claim or loss. Insurers are not known for gratuitously paying uncovered claims, and coverage disputes are common, particularly for high-dollar claims and losses. Some coverage disputes and denied claims are inevitable, but many can be avoided by taking the following steps when renewing your company's insurance program:

Identify risk exposures. Insurance renewals are a good time to evaluate your company's most significant risk exposures. Have your operations changed since the last renewal? Have there been new legal developments that may make your company a litigation target? Have you acquired new assets? Has your company's appetite for risk changed?

Buy the right policies. Not all risks can be insured against, but many can. Liability insurance, sometimes referred to as "third-party insurance," protects against the cost of defending potentially covered claims and covered settlements or judgments. "First-party" insurance covers direct losses to property owned by or in the custody of the insured. Some of the most common types of insurance policies are:

1. Commercial General Liability (CGL) – covers lawsuits seeking damages for bodily injury, property damage, advertising injury, and personal injury.
2. Excess/Umbrella – provides additional limits when primary insurance is exhausted. Umbrella policies may provide broader coverage that fills in gaps not covered by primary insurance.
3. Directors and Officers (D&O) – covers claims alleging that individual insureds committed wrongful acts in their capacity as directors and officers. May also cover claims against the company itself.
4. Employment Practices Liability Insurance (EPLI) – covers claims alleging wrongful employment practices, such as discrimination, retaliatory discharge, sexual harassment, etc.
5. Fiduciary Liability (FLI) – covers claims alleging that individual insureds or the company committed wrongful acts in their capacity as fiduciaries of an employee benefits program.
6. Professional Liability (sometimes referred to as "Errors & Omissions" or "E&O") – covers claims alleging that the insured was negligent in providing professional services.
7. Cyber and Privacy Liability – covers claims and losses arising out of data breaches, privacy issues, social engineering, computer virus transmission, and similar risks.
8. Environmental – covers claims and losses related to environmental incidents, such as pollution spills, toxic cleanup, etc. that are not covered by other policies due to pollution exclusions.
9. Commercial Property – covers physical damage to tangible property. May also cover business interruption losses caused by covered property damage.
10. Builder's Risk – covers physical damage to property that is under construction. May also cover "soft costs" (e.g. debt service, increased insurance costs, etc.) caused by covered property damage.
11. Workers' compensation/employers liability – covers an employer's statutory obligation to pay workers' compensation benefits and covers the employer's liability for work-related employee injuries or disease that are not compensable under state workers' compensation laws.
12. Commercial auto – covers claims and losses arising out of the use of the company's vehicles.

Ask a lot of questions. "That's just how it's done" is never an acceptable explanation from an insurer or broker. Make sure you understand your coverage. Consider retaining coverage counsel to review your insurance program to make sure that it provides the scope and type of protection you need.

Buy the right amount of coverage. Consider limits and deductibles/SIRs. For liability insurance, consider both costs of defense and potential judgments or settlements. For property insurance, consider the cost to repair or replace damaged business property, potential lost profits resulting from damage to business property, and the cost of keeping your business running while the damaged property is being repaired or replaced. Your insurance broker should be able to provide you with information about the policy limits that similarly-sized companies in your industry are buying.

Explore the marketplace. The policy with cheapest premium is not always the best option. Are you really comparing "apples to apples" policies? Does the insurer have a reputation for fighting with its insureds over insurance claims? Is the insurer in good financial health? Pursue policy enhancements. Your broker or coverage counsel can help you identify state-of-the-art policy enhancements that are available, often for no extra premium.

Confirm that all entities on your org chart are covered. Don't make assumptions about which entities or individuals are covered. Carefully review the policy language that lists or describes the entities and persons that are covered by the policy. Pay attention to policy language that excludes coverage for partnerships, LLCs, and other types of business entities.

Recognize that you don't have "standard" policies. Insurance policies are highly customizable, and the policy forms and endorsements that are best-suited for another company in your industry may not be the best for your company. There are thousands of different policy forms and endorsements used by domestic and foreign insurers. Negotiate for changes to policy language that meet your expectations and needs.

Read your policies. Insurance policies are contracts. Just like any of your company's other business contracts, you should be aware of and understand the key provisions. A single word or phrase in a policy could be the difference between coverage and no coverage. Does your professional liability policy accurately describe the professional services provided by your company? Does the "insured v. insured" exclusion in your D&O policy contain an exception for claims by a bankruptcy trustee? Is the policy non-rescindable with respect to Side-A or non-indemnifiable claims? To understand the protection provided by your policy, you must read the policy declarations, insuring agreement, definitions, conditions, and exclusions. If there are portions of the policy you don't understand or that appear to be incorrect, consult with your broker or coverage counsel.

Review your policies' defense and notice provisions. If claims are made frequently against your company, make sure that the defense and notice provisions in your liability policies are consistent with your internal claims handling practices. Is there a reporting requirement for all claims or only those claims of which the risk manager, in-house counsel, or c-level executives are aware? Does the policy permit notice of circumstances? Does it require notice of oral claims? If you don't want to have to notify the insurer of claims below a certain liability exposure threshold, make sure your policy's notice provisions permit delayed notice. Otherwise, a small claim that becomes a big claim may not be covered if you didn't provide timely notice. If you want to be able to select your own defense counsel and control your own defense, make sure that the policy gives you that right.

Review contractual insurance specifications and indemnity provisions. Many different types of business contracts require the parties to maintain specific types and amounts of insurance. Failure to maintain this insurance may be a breach of contract. Policy renewal is the right time to confirm that you are in compliance with contractual insurance specifications. If you are contractually obligated to name a party as an additional insured, confirm that your policies contain the correct additional insured endorsements. Conversely, make sure your contracts contain updated and specific insurance requirements and indemnity provisions so that you are able to protect your policy limits by relying on other parties' insurance, as appropriate.