



Professional Liability Insurance Protection

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Have you ever wondered what would happen if you were sued in your personal capacity or under investigation for a job related matter? Some of your immediate concerns would be who would you turn to—how would you defend—and how would you pay for it? If you had professional liability insurance, you would be prepared for such an event. These liability insurance protection plans provide legal defense services to you if you are accused of job-related wrongdoing and also offer indemnification (usually up to \$1 million dollars) if you are sued and a judgment for money damages is issued against you. And because we often receive inquiries asking us whether federal employees and managers need to buy a professional liability insurance protection benefit plan, and if so which one, we thought we'd take this opportunity to offer you some insight as you proceed to evaluate whether to buy professional liability insurance protection benefits or switch providers.

The following is a brief overview of the potential personal liabilities federal managers and employees sometimes face in their careers, as well as information about the professional liability insurance protection benefits offered to federal employees.

I. Let's clear up one major misconception --you as a federal employee can be sued. The question is whether DOJ will defend you and whether you will have a successful defense.

Federal employees at all levels can be sued personally by private persons for alleged violations of their constitutional and common law rights. These issues arise most often for law enforcement officials, but also arise for non-federal law enforcement managers and employees who have frequent dealings with the public, such as those at the IRS, the Bureau of Customs and Border Protection and Immigration and Customs Enforcement, the Transportation Security Administration, and the Animal and Plant Health Inspection Service. In addition, many federal managers and executives in and out of law enforcement make decisions which could subject them to suit by a citizen. In most civil suits, the Department of Justice will represent the named individual federal employee defendant and judgments are rarely issued ordering individual employees to pay damages. On occasion, however, DOJ will refuse representation in the civil suit and the individual must then obtain private counsel at his or her own expense to defend in court. With lawyer hourly rates running upwards of \$275 to \$400 per hour for experienced lawyers, an individual forced to retain private counsel finds him or herself quickly paying a lot of money in legal fees, even if the allegation is ultimately disproved.

While federal employees are absolutely immune from suit for common law torts¹ if they are

¹ A common law tort is a civil wrong that does not rise to the constitutional level, such as the tort of negligence. Examples of negligence actions commonly brought against federal employees are suits of medical malpractice against VA doctors and suits against postal service carriers who are responsible for car accidents while making
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performing their official duties, otherwise known as acting “within the scope of employment,” and have qualified immunity in suits alleging constitutional torts,² this does not mean a federal employee cannot be sued. In fact, according to the Department of Justice, thousands of federal employees are sued annually!

If DOJ determines that the federal employee is acting in the scope of his/her employment and that it is “in the interest of the United States” to represent that person (a discretionary decision), then DOJ will defend the employee. In suits based on common law torts, DOJ will take over and seek to have the United States substituted as the defendant. In suits based on constitutional tort claims, DOJ will usually file a motion to dismiss the lawsuit with arguments for obtaining qualified immunity for the employee. The likely result in either case is that after some litigation, the suit will be dismissed.

But you should also know that DOJ has frequently taken the position that it is not in the scope of your employment or the interest of the U.S. to defend an employee where the suit involves unauthorized physical contact, use of inappropriate language, and other similar inappropriate or unauthorized conduct. In these cases, the employee is forced to retain private counsel at his/her own expense, and of course may become personally liable to pay a judgment or settlement if he or she unsuccessfully raises an immunity defense.

II. What do professional liability insurance benefits programs offer to federal employees?

First, as long as any civil claim brought against you as a federal employee arises from actions taken in the “scope of your employment,” the benefits protection programs offered to federal employees by most providers includes coverage, paying up to \$1,000,000 in damages, regardless of whether your agency authorizes payment of the judgment from agency appropriated funds. These liability protection programs also will pay for private legal defense (selected by the provider) if DOJ will not defend you. If you suddenly find yourself facing a civil suit or criminal charges without DOJ representation, defending yourself can run \$25,000 to well over \$100,000 in legal fees.

Second, the benefits protection programs have one very large added attraction, an administrative defense coverage provision, which has become the single most important reason why non-law enforcement federal employees purchase the insurance. This provision entitles a federal employee who is accused of some kind of job-related wrongdoing to have defense counsel

deliveries. Negligence actions are by no means the exclusive category of common law tort actions brought against federal officials.

² A constitutional tort is a civil wrong that rises to the constitutional level. These types of civil actions are usually brought against employees engaged in federal law enforcement activities. Federal agents and prosecutors are commonly sued for allegedly violating someone’s 4th Amendment right under wrongful arrest and defective search warrant claims. Bureau of Prisons employees are commonly sued under the 5th Amendment for claims alleging unconstitutional conditions of confinement.

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appointed and the related legal fees paid for in an administrative investigation (including an investigation for alleged whistleblower reprisal by OSC or an EEO investigation where you are named as the responsible management), disciplinary action, judicial sanction proceeding, and criminal defense proceeding.

Considering how easy it is to make targets of federal officials, more and more managers, supervisors or law enforcement officials are accused of and investigated for some allegation at some point in their careers. After all, our system allows baseless allegations to be made without consequence to the accuser. In what may become a super-charged environment, an agency lawyer may be assigned to assist you in an OSC or EEO investigation. But as we have written in prior articles for this publication, this attorney represents the government's interests, not yours as an individual employee, and the agency attorney may advance a position adverse to yours.

If you are directly accused of wrongdoing, particularly in an OIG or internal management investigation into allegations of managerial wrongdoing by you, you will be on your own. Bargaining unit employees facing accusations of misconduct are generally entitled to representation provided by the union. As you already know, management officials, supervisors, executives and many law enforcement personnel are not eligible to be in a bargaining unit, and therefore, are not entitled to legal representation by the union. It can easily cost \$10,000 to \$25,000 to defend yourself in an OIG, OSC, EEO, congressional, or management investigation. And, it can cost at least \$30,000 to \$100,000 to take your case through the MSPB if you become the subject of a disciplinary action after the investigation concludes.

Finally, federal agencies are required by law to reimburse management officials, supervisors and law enforcement officials for up to half the annual cost of purchasing liability benefits protection.

III. How should I choose among the professional liability insurance providers?

First, you should compare the coverage offered by each provider. To learn what is covered under each provider's civil, administrative, and criminal coverage areas, the easiest way to get this information is on the internet! Read the information closely as there are some substantial distinctions in coverage offered, even though each provider offers the same \$1 million dollar indemnification for civil suits, up \$200,000 in legal defense for administrative actions (investigations and disciplinary proceedings), and up to \$100,000 in legal defense for criminal investigations and proceedings.

Second, learn about the customer service you will obtain from each provider. For example, how do you file a claim; do they assist you with the claim filing procedure; how are claims coverage decisions made and by whom; how is legal defense counsel assigned, whether the provider chooses counsel for you, and if so, what lawyers are used; and how knowledgeable is the provider about the types of circumstances that could lead to federal employee liability claims.

Third, what other benefits accompany the basic civil, administrative and criminal defense coverage offered by each provider. The plans vary greatly on this.

Fourth, if you are a member of an employee association, learn whether your association recommends a certain provider, and if so the reasons why.

Finally, is the issue of price. The pricing among professional liability protection providers is all competitive varying by less than \$40.

IV. Conclusion.

Hopefully, this helps explain the professional liability question for you. Over the years we have represented more than a thousand federal supervisors, managers, law enforcement officials and executives in all types of investigations, disciplinary proceedings and even civil suits and criminal actions. Some of our clients have had the liability protection benefits, others haven't. Those who did breathed a sigh of relief as legal fees and expenses grew and they were still able to mount a zealous defense without sacrificing retirement dollars, college savings funds and other savings. Those who didn't wished they did.

*Shaw, Bransford & Roth, P.C. (SBR) is a law firm in Washington, D.C. SBR is frequently assigned as defense counsel to represent federal employees through their professional liability insurance benefits offered by Federal Employee Defense Services (FEDS). As such, SBR earns fees from FEDS to represent federal employees on covered claims. In explaining how federal employee professional liability protection works, SBR is not making a legal recommendation whether any particular federal employee should purchase a professional liability protection benefits package, or whether the employee should purchase from FEDS. That recommendation and decision depends on the particular circumstance of the federal employee who is contemplating making the purchase. You may want to consult with your own attorney about whether to purchase a professional liability protection benefits package. You may also want to review the different protection packages available from providers before making any purchase decision.