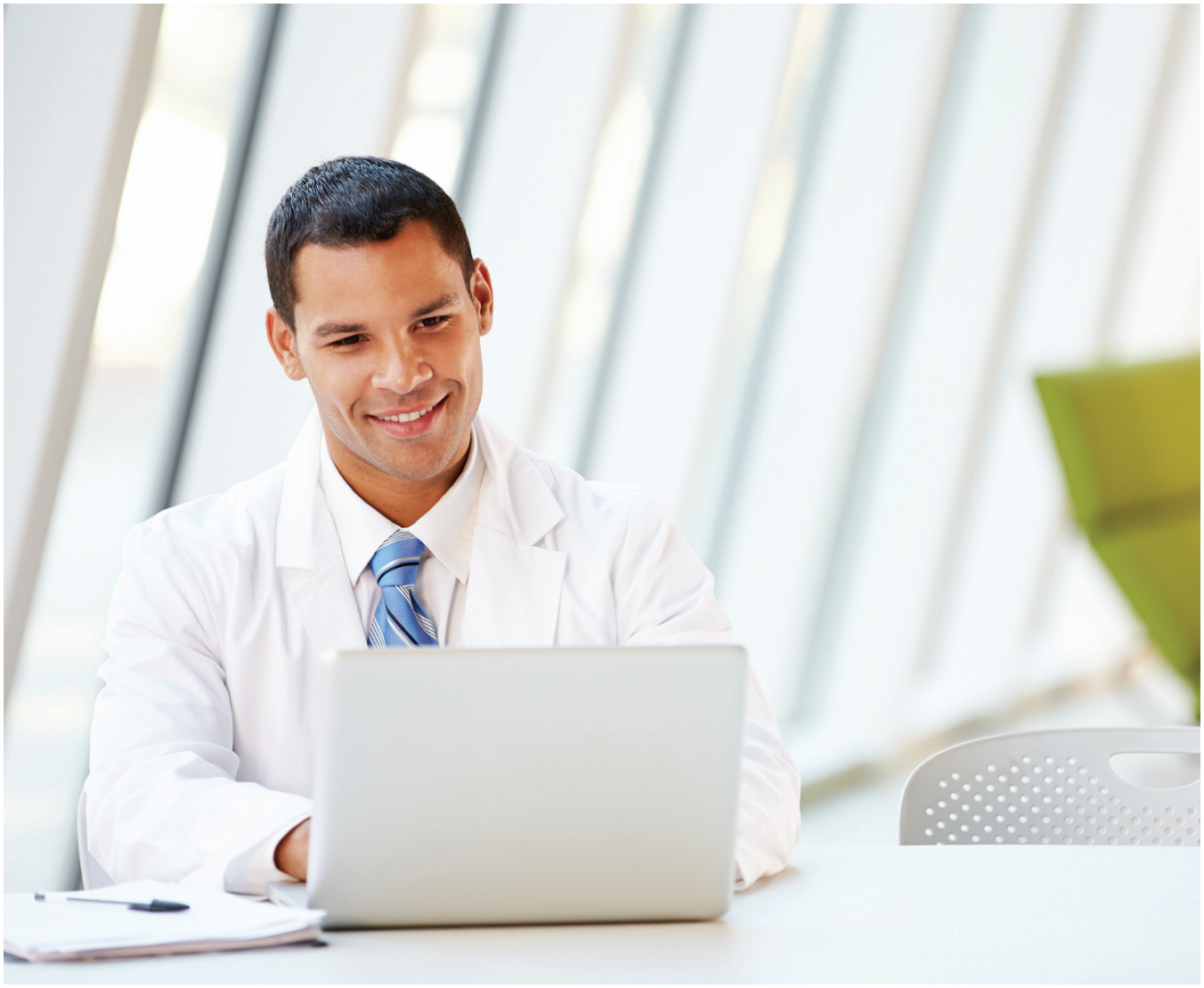
MedMal DIRECT®
Insuring a Healthy Practice

Liberty International Underwriters®



Employed Physicians: Risk Exposure Paradigm

Recent medical school graduates and/or seasoned providers are increasingly made aware of the option to work as a hospital employee; under this employment arrangement, it is important to consider professional liability exposure. From the purchase of a physician's "tail" coverage, to the choice of captive versus commercial coverage, or the joint defense of a lawsuit, all aspects of these essential components of this new risk exposure paradigm must be considered from the point of view of both the physician and hospital.

Discussion:

When a seasoned, independent physician discusses employment with a hospital, it's common for the hospital employer to require a physician to purchase an "extended reporting period endorsement" (also known as "tail" coverage) before treating patients in the physician's new role as an employee of the hospital. As a result, the hospital is assured that the risk exposure generated from the physician's prior clinical activity will not be its exposure. (For the same reason, a hospital's captive insurance carrier usually does not choose to provide "prior acts coverage" to the physician – it does not wish to insure clinical activity that was not under its advisement.) This is sound thinking on the part of the new hospital employer, but leaves the physician with a decision: should the insurance be purchased from the physician's legacy insurance carrier, or should a competitive quote be entertained from an additional carrier?

Typically, it is in a physician's best interest to seek a quote for "tail" coverage from multiple medical professional liability commercial insurance carriers, as competition will generate the best coverage for the smallest premium. It is strongly recommended that a physician consider this type of policy, even though the cost can be somewhat burdensome – as much as two times the physician's current annual premium. This purchase will assure coverage of all claims arising from treatment rendered between the retroactive date of the physician's current policy and its cancellation date, no matter when a claim arises in the future. Physicians should consider including the cost of "tail" coverage in contractual negotiations with a new hospital employer.

> *Education is a key in determining the advantages and disadvantages of the hospital's policy as it pertains to the physician's practice. There are many considerations physicians should undertake in deciding whether to purchase an individual policy. These considerations may include the physician's role and involvement in consent to settle or whether coverage is afforded for activities outside of employment such as volunteering, moonlighting or providing care in emergency situations or as a Good Samaritan.*
>
> **Valoree J. Celona Hall**
> Senior Vice President
> LIU Medical Professional Liability

Once a physician has assured all risk exposure prior to becoming a hospital employee has been properly protected, it is wise to address the decision as to how coverage will apply as an employee. Many hospitals provide the opportunity for a physician to choose between (a) joining the hospital's captive insurance company or (b) purchasing commercial insurance separately. Best practices indicate it is favorable to consider the idea that both the physician and hospital have these two risks insured separately – to have the hospital's risks insured by its captive insurance company and the physician's risks insured through the purchase of commercial medical professional liability insurance.[1] The purchase of commercial insurance can be made on behalf of all employed physicians as a single purchasing unit, or it can be made individually.

It can be beneficial for a hospital to have physicians outside of its captive for several reasons:

1. Typically, hospital risk managers and administrators are outstanding at what they do daily to safely, efficiently and profitably run a complex institution and deliver outstanding medical care to the community. However, they may lack experience in the many functions of running an insurance company that insures physicians for professional liability. To keep the hospital's administrative costs and time commitments to a minimum, it is common to outsource this captive management to another group of experts who possess the skills to handle such duties involving claims, finance, regulatory, reinsurance, auditing and underwriting. The extensive depth and expertise of a commercial insurance carrier can be utilized not only for separately insuring physicians, but also for the management of this hospital captive.

> *At MedMal Direct we strive to provide transparency throughout the medical professional liability process. While we certainly cherish the independent doctor, we also want to ensure all physicians understand the dynamics of medical professional liability.*
>
> **Robin Dudasik**
> SR. VP of Sales & Marketing
> MedMal Direct Insurance Company

2. If the captive provides coverage for the hospital and also insures physicians, surgeons, nurse practitioners, physician assistants, nurse midwives and nurse anesthetists, then the hospital will likely become the excess insurance layer for all of these healthcare providers. The hospital will not only be held vicariously liable for its actions, but will also have a more direct relationship as an employer with the same insurance pool of money covering all. This could lead to higher frequency and severity of claims and increase the duration of claims against physicians because a captive that covers both the healthcare provider and the hospital will have potentially created a larger financial target for plaintiff attorneys to pursue.

3. A hospital wants to protect its captive insurance company from doctors who generate high-damage claims on a frequent basis. Most of the time, this can be avoided with good underwriting from the captive manager; however, many captives simply insure all employed physicians as long as basic credentialing standards are met. It's frequently said that 5% of physicians produce 50% of losses,[2] and without experienced underwriting by seasoned professional underwriters, the financial integrity of the captive insurance company can be compromised. This entire risk can be avoided by having physicians insured separately from the captive by a commercial insurance carrier.

4. It is a commonly perceived that a joint defense with the same attorney representing a hospital and physician is the best course of action, but is that true for the physician? The hospital's large policy limit cannot only increase the frequency of lawsuits against a physician who is tied to that hospital and its defense, but can also lengthen the duration of the lawsuit as the plaintiff attorney maneuvers overtime to get the highest possible settlement or award. However, how will the allocation of defense costs be made? Who has the final authority to grant permission to settle the case? Who has the final say on the apportionment of any settlement? Who is paying the attorney?

Obviously, it is counterproductive for defendants in any lawsuit to point fingers at one another because that behavior only benefits the plaintiff, but a physician does have completely separate risk exposures and defenses in these lawsuits. It is possible that it is in the best interest of a physician to have their own defense attorney representing their own financial interests and reputation.

Conclusions:

If a physician makes the decision to become an employee of a hospital, best practices dictate the physician should consider purchasing (a) "tail" coverage from a commercial medical professional liability insurance carrier before becoming an employee of the hospital and (b) a commercial insurance policy while being an employee of the hospital. These best practices also suggest the hospital should have a self-insured retention (SIR) limit that is funded through an actuarially sound captive insurance company, which is not only managed by insurance professionals, but also only insures the hospital and its non-physician employees. This combination, when paired with clinical and systems-oriented risk management programs, is the paradigm most likely to produce administrative efficiency, while also reducing the frequency and severity of claims against both a physician and a hospital. It is a win-win situation for all.

1. Brigham, Jeremy, and Ed Wrobel. "The New Physician Employment Model and Malpractice Insurance: What You Don't Know Could Cost You." *The New Physician Employment Model and Malpractice Insurance: What You Don't Know Could Cost You.* Becker's Hospital Review, 19 Sept. 2014. Web. 26 Oct. 2016.

2. LeMasurier, Jean. "Physician Medical Malpractice." *Health Care Financing Review*. CENTERS for MEDICARE & MEDICAID SERVICES, 1985. Web. 26 Oct. 2016.