



# Loss Control TIPS

## Technical Information Paper Series

*Innovative Safety and Health Solutions<sup>SM</sup>*

## Errors or Omissions for Schools

### Introduction

Errors or Omissions coverage (E&O) is unique, in that E&O policies are designed to provide coverage for “wrongful acts” committed by a school’s officials or representatives (including, in some cases, volunteers). The policy provides coverage to protect the taxpayers’ money and the individual officials’ and employees’ personal assets. E&O is coverage for financial claims only. Errors or Omissions means injury or damage that arises out of an insured’s rendering, or failure to render, service within the scope of the insured’s facilities or operations.

### Exclusions

Claims for bodily injury, property damage, personal injury, Workers Compensation or Law Enforcement Liability are usually excluded (coverage for these types of claims is usually found in Comprehensive General Liability [CGL], Workers Compensation or other policies). Other common exclusions are claims for “injunctive relief” and claims involving eminent domain. Injunctive relief claims do not seek damages; therefore, no subject for insurance exists. Eminent domain issues, which are the result of governmental action, are also uninsurable. (Eminent domain refers to the right of a government to appropriate private property for public use, which usually involves compensation to the owner.) Since government actions cannot be actuarially predicted, this area is uninsurable as well. (See Figure 1.)

**Figure 1. Common E&O Policy Exclusions**

<i>Exclusion</i>	<i>Reason for Exclusion</i>
1. Bodily Injury	1. Provided by CGL
2. Property Damage	2. Provided by CGL
3. Personal Injury	3. Provided by CGL
4. Injunctive Relief	4. Does not ask for damages, therefore, no subject for insurance
5. Eminent Domain	5. Governmental function, therefore, uninsurable
6. Automobile Liability	6. Covered by another type of insurance (auto)
7. Workers Compensation	7. Covered by another type of insurance (WC)
8. Law Enforcement Activities	8. Covered by another type of insurance (Law Enforcement Liability)
9. Pollution	9. Covered by another type of insurance (usually excess coverage)
10. Willful/Wanton Acts	10. Not insurable
11. Fraud/Dishonesty	11. Not insurable
12. Gaining Profit/Advantage through Public Office	12. Not insurable



## Wrongful Acts

Errors or Omissions claims may arise from claimants both inside and outside the school. E&O claims involve *wrongful acts* that generally involve at least one of the following:

- *malfeasance*, or the performance of an unlawful or wrongful act
- *misfeasance*, or the performance of a lawful act in an unlawful or culpably negligent manner
- *non-feasance*, or the non-performance of some act which one is bound by legal or official duty to perform.

Examples of wrongful acts may include the following:

- Wrongful discharge of an employee
- Failure to follow legal procedures
- Failure to supervise employees
- Improper contract bidding procedures
- Violations of individuals' civil rights

The most common Errors or Omissions claims involve employment issues, such as improper discharge, discrimination, failure to promote, or sexual harassment. Schools may also become involved in E&O issues involving contracts (employment or others), improper use of school funds, negligent hiring or supervision, and negligent retention. All offer significant loss potential to the school.

## Risk Management

Schools can implement any of various Risk Management techniques to control the Errors or Omissions exposures

### Documentation

1. Document! Document! Document! Proper development and retention of appropriate records is a critical step. To reduce the negative effects of a potential lawsuit, maintain adequate documentation of operations. Appropriate documentation includes, but is not limited to the following:
  - Employment policies and procedures
  - Individual employment records, including employee performance reviews and other documentation
  - Accident records
  - Maintenance records
  - Public meetings/hearings records
  - Inspection records
  - Employee/volunteer training records
  - Environmental impact studies
  - Complaint files

2. Documentation is a *two-edged sword*. If a written policy is established, it must be followed. To do less is to recognize an issue and then ignore it, which could constitute negligence. Once issues are found and documented during inspections, corrective action must be taken. To do less is also to recognize a hazard and subsequently ignore it, which could also constitute negligence. If the school must defend itself in court, adequate records can help prove that appropriate policies and procedures were in place. However, if the established policies and procedures are not being followed and documented as written, the school could have a hard time defending its position.

### **Create Awareness of E&O Exposures**

1. Establish formal policies. Formalize policies and procedures in writing; distribute them to all employees and volunteers. Policies and procedures cannot be effective unless the affected parties know that they exist.
2. Establish training programs. Develop and implement adequate training programs for all employees and volunteers. The training should be consistent across all departments. The entity's policies/procedures should form the basis for the training programs. The training should stress the consequences of actions that can legally bind a public entity.

### **Be Public**

By being as public as possible, a school can significantly reduce E&O exposures.

1. Hold public hearings. When considering a new project, development or method of operation, hold public hearings on the subject.
2. Encourage attendees at hearings to share opinions and suggestions. However, be careful not to simply give a paternalistic “nod” to suggestions offered. Consider the ideas and, where they make sense, implement them. When the idea cannot be implemented, let it be known why it can not be. The school should foster the idea of the public *working with*, rather than *fighting against*, the school and its board.

### **Avoid “Making Deals”**

Along with being public, avoid conduct that suggests that secret “deals” are being made.

1. Avoid closed-door meetings, especially where it appears that involved individuals may profit from the outcome.
2. The potential for E&O claims increases significantly when questionable decisions are made, especially with little public input.

### **Provide Awareness of Antitrust Exposures**

1. Legislation has been enacted to ensure that the nation's free market remains viable. To different degrees, the following acts address antitrust issues: the Sherman Act (1890), the Clayton Act (1914), the Federal Trade Commission Act (1914), and the Robinson-Patman Act (1936).
2. Establish programs, and provide employee training, to deal with antitrust issues, such as contracts and procurement.

## Address Contractual Risks

Because contracts present a significant area of E&O exposure, establish a formal process of soliciting and hiring outside contractors. Several issues must be addressed:

- Develop a written, mandatory competitive bidding process, with provisions to include small and minority contractors.
- Develop written contract specifications and hold contractors to those parameters.
- Avoid conflicts of interest.
- Maintain adequate records.

## Expert Review Of Procedures

In a “good faith” effort to reduce E&O potential, engage impartial outside experts and/or consultants to periodically review a school’s policies and procedures. However, there are some concerns associated with such a program:

- Outside experts/consultants may be cost-prohibitive to smaller schools.
- Consultants may identify problems and offer solutions that the school had not anticipated.
- Once problems are identified, the school should take timely, corrective action. Failure to do so may actually place the school in a more vulnerable position, since it eliminates, as a defense, the claim that a school should not be charged with knowledge of the problem. Once a problem becomes known, appropriate corrective action *should* be taken. Ignoring the problem raises questions of negligence.

## Summary

Errors or Omissions exposures can be devastating to a school if they are not recognized and controlled. Areas involving employment, discrimination, sexual harassment, and procurement should be addressed through comprehensive written policies and procedures. Once established, the policies must be enforced through proper training and review. Adequate documentation is critical to controlling the potential for loss. Problems should be corrected as quickly as possible.

For more information, contact your local Hartford agent or your Hartford Loss Control Consultant. Visit The Hartford’s Loss Control web site at <http://www.thehartford.com/corporate/losscontrol/>

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