

CHOOSING THE RIGHT TAIL COVERAGE



While you are planning for your retirement, the dissolution of your law practice, or a change in your career, you should be aware that any activity connected to the last cases you handle may follow you into the next phase of your life for years to come—including professional liability claims. As you take steps to leave the practice of law, consider extending your current professional liability insurance through the Extended Reporting Period (ERP) option.

Commonly known as tail coverage, an ERP policy is widely available to legal professionals who retire or cease practicing law. Professional liability policies typically are available as “claims-made” forms, which provide coverage for liability claims made against an insured while the policy is in force. The ERP option provides protection for claims that are made against an insured after a professional liability policy has expired. The claim-resulting incident must have occurred after the policy’s retroactive date and before the policy has expired. The retroactive date is usually the date that the coverage was first purchased by the insured.

For example, if you first purchased a policy from an insurer on April 1, 1999, the retroactive date also would be April 1, 1999—and this date is usually listed along with the effective date on the declaration page of the policy. Suppose over the next ten years you continued to renew your policy without a lapse in coverage, which is critical in maintaining your retroactive date. If you then decided to retire on April 1, 2010, you would notify your professional liability carrier of your intentions prior to that date.

An insured’s existing policy usually outlines a variety of options for extended coverage. The cost of the ERP is based upon the expiring premium and the length of time you wish to extend your coverage—the longer the period, the more the premium costs. Additionally, because ERP premiums are fully earned, financing options are usually limited.

Here is an example of what to look for regarding an ERP provision in a policy form. The additional premium for an Extended Claim Reporting Endorsement shall be:

- 100 percent of the annual premium for a one-year extended reporting period;
- 175 percent of the annual premium for a three-year extended reporting period;
- 200 percent of the annual premium for a five-year extended reporting period; or
- 250 percent of the annual premium for a seven-year extended reporting period.

A number of policies provide an “automatic” ERP, which allows an insured to report claims following the expiration or termination of the policy for no additional premium. Automatic ERPs generally are offered for either thirty- or sixty-day periods—the latter being more favorable for the insured. However, this type of ERP offers very limited coverage. Automatic ERPs are not recommended as a long-term solution to potential liability.

During the period when the automatic ERP is in effect, you will need to make a prompt purchasing decision, because selecting another ERP option must be done before the automatic ERP period expires. The grace period of an automatic ERP only covers you for the time that you were covered under the policy. During the automatic ERP period, you have the option of extending the period further—beyond the thirty or sixty days—to cover you and your firm for events that occurred during the time when the policy was in force. Also note that many policies do not offer coverage during the election period for acts that took place after your policy expired.

As always, do your homework and plan ahead if you intend to retire within five years. Some insurers will provide “free unlimited” terms for ERPs. To be eligible, you must meet their age requirement and be consecutively insured by the carrier for a minimum of four years. (Some insurers even offer this benefit if you’ve been insured for as little as three consecutive years.)

Here is an example of a policy form providing “free unlimited” terms for ERPs for qualified customers:

The Named Insured shall also have the right to have an endorsement issued extending the reporting period

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for this policy to an endorsement issued unlimited period following the effective date of such cancellation or non-renewal upon his or her retirement from the private practice of law and the payment of additional premium for this option will be waived if:

(a) The named insured is an individual and has been continuously insured by the Company under a claims-made Lawyers Professional Liability Insurance policy for at least:

Seven consecutive years prior to such cancellation or non-renewal and is at least fifty-five years of age at the time of retirement; or

Six consecutive years prior to such cancellation or non-renewal and is at least fifty-six years of age at the time of retirement; or

Five consecutive years prior to such cancellation or non-renewal and is at least fifty-seven years of age at the time of retirement.

(b) Written notice of this election is given to the Company within sixty days after termination of this policy; and

(c) All premiums and deductibles due the Company have been paid in full.

The ERP option is also important for your soon-to-be-former partners and employees. Generally, if you are leaving a firm that is continuing its professional liability insurance, you will still have coverage for professional services performed on behalf of that firm. If your former firm dissolves without tail coverage or fails to maintain a current policy, you will not be covered for a subsequent claim.

If you are leaving an established practice to start your own firm, an option known as "individual prior acts" coverage may be available. If you choose this option, your insurer would issue an endorsement that contains a specific retroactive/prior acts date that would coincide with the start date for your new firm.

You also should be familiar with the death/disability ERP provision that some carriers include within their policy form. This provision states that any lawyer

qualifying as an insured who dies or becomes permanently disabled will be entitled to an Extended Claims Reporting Endorsement with an unlimited reporting period at no additional premium. The insured's right to the issuance of an Extended Claims Reporting Endorsement is subject to conditions:

The insured was employed by the Named Insured during the Policy Period and suffered death or disability during the Policy Period;

In the event of disability, the Insured is totally and continuously disabled from the practice of law a minimum of six months prior to the election of the option;

Satisfactory written evidence of death or permanent disability is provided to us within ninety (90) days following the death or disability;

The Insured or Insured's representative notifies us of the death or disability and requests issuance of an Extended Claims Reporting Endorsement within thirty (30) days following the cancellation, non-renewal or expiration of this policy; and

The conditions described above on Subsection 11.a. have been met.

The remaining issues to consider involve statutory mandates pertaining to the area of practice the firm handles. You should take these into consideration when deciding on the length of time for the ERP that you purchase. A firm specializing in bankruptcy would likely purchase an ERP option that is shorter in its time of operation than one chosen by a firm focusing on trusts and estates work.

Many loose ends must be tied up before you retire or make a major career change. One involves the many ERP variations that insurers provide. Don't forget to ask your insurance broker for help. Knowledgeable brokers work with many different carriers and know the provisions of all their available policies. A savvy broker will direct you to an insurer who will reduce your costs, minimize paperwork, and help pave your way to a happy retirement. ■