



# Fine Print

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## Is Your Business at Risk for a Professional Negligence Claim?

By Doug Holthus

If you're a licensed professional, you are potentially exposed to a claim of professional negligence; malpractice, by any other name. Physicians and nurses, real estate agents and brokers, engineers and architects, chiropractors, podiatrists, accountants, dentists, attorneys, pharmacists... virtually anyone who pursues a career in a licensed professional setting may have to defend against such a claim.

If someone brings a professional negligence claim against you, you will usually receive advance notice in the form of a letter. Sometimes, however, receiving a complaint and summons may be your first clue. If you receive a summons and complaint, you have 28 days to answer the allegations. Otherwise, you could be found in default. Seeking legal counsel immediately after receiving the complaint is essential.

No matter how or when you are notified, the complaining party (the plain-

tiff) always has the burden of establishing all four elements of a claim of professional negligence (duty, breach of duty, proximate cause, and damages). Unless all four elements are established by a preponderance of evidence, the claim will fail.



In order for a plaintiff to prove the claim against you, another professional who practices in the same field as you do and

is recognized by the court as an "expert" must testify that you owed some duty and that you breached your duty. The expert also must testify how

your alleged failure caused the injury or damage and offer an opinion about how the injury or damage might be compensated (called "damages").

Whether you are bringing or defending a professional negligence claim, you should be aware of the various statutes of limitation that apply. In other words, the claim must be brought within a particular period of time or a court will not hear it.

Except for claims of wrongful death, a one-year statute of limitations applies to "medical claims," such as claims against physicians, nurses, dentists, optometrists, chiropractors, podiatrists, physical therapists, physicians' assistants and emergency medical professionals; and claims against facilities, including hospitals, nursing homes and residential facilities (or an employee of any of these). Under specific and limited exceptions, this one-year statute of limitations may be extended. If the claim

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## Is a Safe Harbor 401(k) Right for Your Small Business?

By Kelly A. VanDenHaute

A 401(k) retirement plan can be a valuable tool with which you, as a small business owner, can provide a plethora of essential benefits to your employees, as well as to yourself. A well-designed plan will assist you in

attracting and retaining skilled employees while entitling you to a tax deduction for contributions made to your employees' accounts. Further, monies you and your employees contribute to the plan will grow on a tax-deferred basis until they are distributed. You can design a 401(k) plan to allow your employees to decide how much money they would like to contribute each year, and to manage their

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involves negligent credentialing against a medical professional, then a separate two-year statute of limitations applies.

Most other professional negligence claims are governed by a separate one-year statute of limitations period. With certain limitations and exceptions, this one-year limitation period applies to claims against attorneys, real estate professionals and other licensed professionals. However, claims of accounting negligence are governed by a four-year statute of limitations. Also, claims against architects, engineers and other “design professionals” for personal injury or death allegedly stemming from a faultily designed, constructed or re-constructed building are governed by a ten-year statute of limitation.

What can your business do to protect its professionals? Make sure your professionals are covered under a liability insurance policy, guarding against the potential risks and losses associated with malpractice claims. These policies are subject to specific underwriting terms and conditions, provide varying levels of coverage and, as is typical of any insurance policy, provide for certain coverage exclusions. If you are a licensed professional, you should carry an appropriate liability policy. You should know, however, that no insurer will insure you against losses suffered by your client if your intentional conduct caused the damage.

Because every set of circumstances is unique, the information in this article is intended as a guide only and should not be used as a substitute for advice from your counsel.

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*Doug Holthus is an attorney with the Columbus office of Poling/Petrello.*

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own account investments within the guidelines set for them. Such benefits have been shown to greatly motivate employees to save for retirement. They also contribute to the formation of a stronger bond between you and your employees, which has been shown to increase employee retention rates.

An increasingly popular type of 401(k) retirement plan is the Safe Harbor 401(k). Generally, if you contribute three percent of your employees’ compensation to a “safe harbor” plan, or you make a four percent dollar-for-dollar match on the contributions of each plan participant, then all plan participants (including you, as the business owner) can make the maximum tax-deferred contribution to the plan (\$17,000 for 2012, or \$22,500 for participants over age 50).

Business owners who opt for non-safe harbor 401(k) plans must comply with certain non-discrimination rules that restrict how much they may contribute to the plan. Ordinarily, such “regular” 401(k) plans must satisfy non-discrimination testing each year to show that

highly compensated employees (business owners who own five percent or more of the company qualify as “highly compensated” employees) do not benefit more than non-highly compensated employees. If, instead, you make a “safe harbor” contribution or match as discussed above, you can circumvent this non-discrimination testing process while achieving the maximum tax savings allowable under your plan.

Ultimately, a Safe Harbor 401(k) plan will allow you to provide the important benefit of contributing toward your employees’ retirement while saving for your own retirement, without assuming the higher costs associated with the other available employee benefit options. The deadline for establishing a new Safe Harbor 401(k) plan is October 1 of each year. Consult with an attorney experienced in tax-qualified retirements well in advance of the October 1 deadline.

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*Kelly A. VanDenHaute is an attorney with the Avon firm of Wickens Herzer Panza Cook & Batista Co.*

## **You Should Know...**

In 2009, Family Medical Leave Act and Military Leave Act (FMLA) amendments extended qualifying exigency leave to employees who are covered family members of the Regular Armed Forces where the service member is deployed to a foreign country or international waters, and expanded military caregiver leave to covered family members of recent veterans. In January 2012, the U. S. Department of Labor proposed rules addressing these amendments and made unrelated changes to existing regulations.

Key proposed rule changes include:

- expanding rest and recuperation leave for caregivers from five to 15 days;
- clarifying the definition of “deployment to a foreign country”;
- clarifying that childcare leave rights also apply to family members such as grandparents;
- defining “serious injuries” for veterans;
- adding provisions regarding changes in FMLA eligibility calculations for airline flight crew members;
- making minor changes to intermittent FMLA leave calculations; and
- clarifying the limited circumstances under which employers may delay mid-shift reinstatement of employees on intermittent leave.

Once the rules are finalized, employers must amend FMLA policies accordingly.

*By Patricia F. Weisberg, a partner in the Cleveland firm, Walter & Haverfield LLP.*