Can “mom-and-pop” lab cover liability?

Q I am the director of an independent toxicology and clinical laboratory. This laboratory is owned by two individuals and performs nearly 2 million tests per year. It is sort of the local “mom-and-pop” operation. I am not, however, an employee of the laboratory; rather, I function as an independent consultant for 20 hours a week. Hence, I receive a yearly 1099. The laboratory maintains liability insurance for its employees. Should I maintain my own liability insurance since I have the usual responsibilities of a lab director? If so, how would I go about obtaining this type of insurance?

A The situation you present is essentially a question of risk tolerance and simple arithmetic. As an independent contractor, you may not be indemnified automatically if the lab is sued because the law may well presume both an independent economic status and independent responsibilities for you. It is wise to look at your legal exposure and to make plans in the event that a lawsuit arises.

You have several options in covering your legal exposure in this situation. You can go without liability insurance and pay yourself for the defense of any lawsuit and the portion of any damages you might be required to pay as a result. You can acquire your own insurance coverage. You can ask to be covered under the lab’s policy. Or, you can ask for a formal agreement of indemnification from the lab.

Individual malpractice coverage is available, and its cost will depend on your location and the type of practice in which you are engaged. Often, rates are discounted for part-time (20 hours a week or fewer) practice. Your local agent should be able to shop for policies for you and give you an idea of the rates. You may wish to ask for a proportionate increase in your compensation to cover this expense, or try to include a contract provision that obligates the lab owners to pay it for you.

An alternative to full malpractice insurance, which pays both for legal defense and for the damages if you lose a suit, is defense-only insurance.

An alternative to full malpractice insurance, which pays both for legal defense and for the damages if you lose a suit, is defense-only insurance. This will cover the costs of defending a case (often tens of thousands of dollars — or more), even if it is ultimately meritless. In combination with an indemnification agreement from the lab to pay any damages resulting from a lawsuit in which you are named, this can provide good coverage, sometimes at a lower cost.

Less expensive for you would be to negotiate with the lab owners to include you on their liability policy. Depending on the terms of the policy, this may not be expensive; however, you may have to be a true employee of the lab in order to be included in its policy. Hiring you as an employee may not be acceptable to the owners for other reasons (e.g., taxes, unemployment benefits, and health benefits). If you are hired as an employee, this has the advantage of transferring the cost of liability insurance to the lab owners and putting all potential defendants under one policy “roof,” making case management much simpler. This solution has the disadvantage, however, of putting the amount of coverage and continuance of coverage entirely in the hands of the lab owners; you would have no say if they decided, for example, to cut the limits of coverage to a level with which you are not comfortable.

A final alternative is to negotiate, perhaps as part of your contract, an indemnification agreement that makes the lab owners responsible for defense costs and for any damages resulting from a successful lawsuit. The disadvantage of this approach is that, in the event your employers balk at meeting their obligations or have insufficient economic resources to do so, you are still involved in a lawsuit you must defend, and you are potentially liable for damages.

In the end, you must weigh the costs of each of these options against the risks they require you to bear and do what works best for you.