



## Shared Liability for ROP Screening

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Examining premature infants for retinopathy of prematurity (ROP) is an important aspect of ophthalmic care. Ophthalmologists who perform this critical consultative function are providing a tremendous service to these infants and to the neonatal intensive care units (NICU) and supporting institutions that care for them. Because these institutions and ophthalmologists work together to reduce the likelihood that significant ROP will develop, they also should share the medical malpractice liability risk should a case of ROP advance to vision loss or blindness. If you perform ROP screening, you should know how your hospital handles this shared risk and take steps to limit your liability in the NICU.

### Hold Harmless/Indemnification

One approach is to ask the hospital to hold you harmless and indemnify you for any liability you incur in performing ROP screening in the NICU. This means the hospital promises to absolve you of any responsibility for damages or other liability and to reimburse you for any loss you suffer arising from your provision of services in the NICU. This would be accomplished by inserting a hold harmless/indemnification clause in your ROP service contract with the hospital. Note, however, that many states limit the types of risks that can be transferred from one party (you) to another party (the hospital). Any indemnification agreement that you and the hospital enter into should be reviewed and/or drafted by legal counsel. Contact OMIC's Legal/Risk Management Department for sample language.

An additional safeguard is for you to be named an "Additional Insured" under the hospital's liability policy. This gives you direct access under the hospital's policy to defense coverage for insured claims whether or not the hold harmless/indemnification provision is legally enforceable. However, "Additional Insured" status should not be obtained in lieu of a hold harmless/indemnification provision because the hospital's insurance policy may not cover the loss.

### Hospital-Provided or Funded Insurance

Another approach is for the hospital to provide you with additional insurance. Again, the specific provisions would be spelled out in your ROP service contract with the hospital. This hospital-provided insurance would coincide with your primary OMIC professional liability insurance. If you negotiate a primary or contributory policy with the hospital, then OMIC and the hospital most likely would share and cooperate in your defense and payment of any (covered) indemnity. (The OMIC policy describes how losses are apportioned when the OMIC policy and other insurance apply to the loss on the same basis.) However, if you negotiate an excess policy with the hospital, the hospital would not generally participate in the defense of the claim unless it is likely you will exceed your primary limits with OMIC. The excess limits would be available, though, if a judgment against you exceeds your policy limits with OMIC. Keep in mind that all determinations of coverage are case specific.

Another alternative is for the hospital to contribute toward payment of your insurance premiums. The AMA reports that hospitals are increasingly helping physicians pay their medical malpractice premiums to ensure that physicians continue to provide services at hospital facilities.

As an OMIC insured, one option for you is to raise your professional liability limits and ask the hospital to reimburse you for the difference in premium. You should seek legal counsel when entering into these arrangements to ensure compliance with federal and state laws regulating hospital payments to physicians.

### Damage Caps and Punitive Damages

When considering any of these options, you should be aware of state laws, such as those governing damage caps and the availability of punitive damages awards, because they will affect how much and what type of liability coverage you should seek. For example, if the state's damage cap is \$1 million and you have \$2 million per occurrence/\$4 million in the aggregate coverage, you can feel more secure that your limits will not be exceeded because of a jury award against you. However, if your state allows punitive damages awards, you might want to negotiate additional insurance from or indemnification by the hospital since the OMIC policy does not cover punitive damages. Your attorney should recommend the most appropriate and viable coverage alternatives and work with the hospital to draft the applicable terms.

You also should note that if a patient files a lawsuit, conflicts of interest may arise between you, the hospital, and other codefendants such as subsequent treating physicians. For example, you might disagree as to whose responsibility it was to provide follow-up ROP exams to a baby you examined once who was then transferred to another facility. In this situation, OMIC might exercise the right to separate counsel for its insured while still focusing on a unified defense.