Directors & Officers & Management Liability Guide

Director & Officers liability insurance and why it is needed?

As a director, you are legally required to act in good faith within the law. You have a duty to act in the best interests of the company, and above your personal interests, and this includes a further responsibility to ensure that other directors do likewise. If you do not, you face fines, imprisonment and compensation for damages that could involve the seizure of your personal assets, such as your home, car, properties, savings.

It is not just directors that face claims, as company officers and senior managers can also be held personally liable for their actions, and many do not even realise that they could have to defend themselves from a legal action.

As a director or officer, your personal liability is **UNLIMITED**, (the limited liability protection of a company only applies to the shareholders) and you may not be able to rely on receiving financial assistance from your company in the event that you are sued. Can you afford not be insured?

What Does A Directors & Officers (D&O) policy offer?

A Directors and Officers (D&O) policy will protect the directors and officers of a company against the cost and expenses of defending an action and civil damages awarded against them as a result of a wrongful act up to the allowed policy limits.

Who is a Director or Officer of a company?

The legal definition of a director is reasonably clear as companies have 'appointed' directors whose positions should be fairly obvious and described in the Company documents. However, The Companies Act provides a non-exhaustive definition of 'director', namely 'any person occupying the position of director by whatever name called' so this can be open to legal challenge.

Officers - the legal definition of an officer is less precise and could include almost any managerial or supervisory position. Case law in the past has held that an 'officer' was someone 'managing the affairs of the company'.

Who can bring an action against a Director or Officer of a company?

- Government Departments or Regulators alleging, breach of regulations, e.g. health and safety, data protection, GDPR breaches, bribery act, competition law, export, corporate manslaughter, wrongful trading, failure to disclose information.
- Employees (past or present) alleging infringement of employment conditions or legislation, e.g. sexual harassment, wrongful termination, age, sex or race discrimination, non-payment of wages, breach of minimum wage law.
- Shareholders (or bondholders or holders of other securities) resulting from a drop-in share price (possibly due to mergers and acquisitions), misleading statements, poor business decisions, mismanagement etc.
- If your company fails, actions can be brought against you by the company's creditors as well as the receivers, administrators and liquidators in respect of wrongful trading in the run-up to the company failure.
- Potential purchasers – incorrect information, failure to disclose information.
- Customers involving contractual disputes, misrepresentation.
- Suppliers alleged misrepresentation.
- Competitors alleging unfair practices, libel and slander, infringement of intellectual property.

What are the key benefits of a Directors & Officers policy?

A policy covers both directors and officers against their personal legal liability arising from a 'wrongful act' committed in their capacities as directors or officers of the company and legal costs and expenses in respect of:-

- Any investigations.
- The defence of any legal action seeking disqualification as a director.
- Extradition proceedings (including appeals).

Company Reimbursement Section – a company can indemnify a director against costs incurred in defence of a civil or criminal prosecution brought against him/her, but there is a restriction in that the defence must be successful. The policy will reimburse the company for any payment, so long as it is required or permitted by law.

Do you realise the extent to which the law requires you to have control of your company?

If you google Director and Officers claims, you will find numerous examples. With some, you will have little sympathy, but others will make you think. For example; when a lorry driver fell asleep and killed two motorists, a court held that not only the operations director but also a co-director should have ensured their driver adhered to the relevant driving regulations. The directors incurred substantial defence costs before both were convicted of corporate manslaughter.

Who can insure as a Director or Officer?

In addition to directors and officers of Limited Companies, most insurers will provide cover for those running a PLC or Limited Liability Partnerships (LLP) and specialist policies are available for the trustees of pension funds and trustees/committee members of Charities, Sports Clubs and the like.

How does Director & Officer cover operate?

Coverage is provided under a claim made basis, the cover is provided for claims made (and reported to the insurer) during the period of insurance only, and therefore it is critical to have continuous coverage in force to ensure that coverage is fully active. A claim is generally notifiable under a D&O policy when the insured first becomes aware of the circumstances that could lead to a claim.

How much Director & Officers coverage should I insure for?

The limit of indemnity is the maximum amount of money that the policy will pay out. D&O policies are usually issued with aggregate limits of indemnity, i.e. the limit is the total amount that can be paid out for all claims made during the policy period and the limit usually includes defence costs and expenses.

It is generally felt that the limit of indemnity should be at least equal to the Gross Assets of the company, but with the current climate of ever continuing regulation, we would advise that £1,000,000 coverage is a good starting point, if it fits within your budget. Although sometimes a lower limit with additional coverage such as employment practise liability may be an option, where more comprehensive coverage at a lower cost is needed.

Is there a policy excess?

Insurers can apply an excess to parts of the policy, and you should seek advice on each policy you review, and if the jurisdiction is extended to cover claims from the USA, then the policy excess is normally increased.

Director & Officers Policies normally include extensions for:

- Entity cover – defence costs only. The company is usually sued at the same time as the director or officer, and this avoids arguments over the allocation of the defence costs between the parties.
- Outside board coverage (i.e. you are requested by your company to join another board).
- Retired directors.
- Acquisitions of new subsidiaries (but are usually subject to the acquired company meeting specific criteria).
- Extended discovery period - when a policy is cancelled, generally a period of 30 days is allowed for claims to be made. More prolonged periods may be available for an additional premium.
- Spouse extension - protects the spouse/heirs in the event of a director/officer's death or if the claim liability is passed to the spouse, i.e. where director/officer or spouse own joint assets such as a house.
- Non-Executive directors.

Employment Practice Liability coverage. Extension available for an additional cost

- In general, the coverage is designed to cover the defence costs and damages resulting from claims for wrongful employment practices brought by past, present or prospective employees against an organisation

Pension Trustee Liability. Extension available for an additional cost

- Designed to cover the personal liabilities of Pension Trustees of a company's pension plan for claims brought by beneficiaries, regulatory authorities or other parties.
- Trustees of a pension place their personal assets at risk and could find themselves liable for civil or criminal punishment if they are found to be mismanaging a pension fund. A standard Directors & Officers policy does not cover this risk.

Commercial Crime. Extension available for an additional cost

Cover for losses following employee theft and third-party fraud.

Who can buy a Directors & Officers Policy?

The company is allowed to purchase a Directors & Officers policy to protect both the company and its directors.

Policies should be issued in the name of the ultimate holding company as this way it will cover the directors and officers of all wholly owned subsidiary companies advised at time of purchase.

If you sell your company a Directors & Officers policy automatically goes into 'Run-Off' once a company is sold or its assets cease to exist.

The acquiring company will need to arrange cover for acts occurring after the change of control and either the selling or acquiring company can arrange run-off coverage for the prior directors and officers for actions prior to the sale.

It is essential to establish who will take responsibility for any run off cover before the sale is completed.

Retroactive date – most policies automatically provide cover for wrongful acts that occurred before the inception of the policy subject to the prior and pending claim exclusion.

The general exception is where a company has been acquired – see 'If you sell your company' above.

Individual insurance can be arranged to cover a director or officer of a number of companies if needed.

Director & Officers Excluded Coverage:

- Dishonest, fraudulent, criminal or malicious acts
- Claims by major shareholders – generally this is shareholders with 15-20% or more of total shares issued, which is seen as too much control, i.e. suing yourself
- Criminal fines and penalties are always excluded. Civil fines and penalties are usually excluded.
- Prior or pending litigation or claims, circumstances notified before the inception
- Acting as a trustee of a pension scheme unless you have taken specific coverage for this risk
- North American claims unless the policy has been extended.
- Bodily injury, property damage and professional duties to a third party (Employers Liability should cover these risks, Public Liability, Material Damage or Professional Indemnity Policies), unless the claim is from shareholders relating to the value of the company's share capital.
- Pollution cover can either be limited or wholly excluded and should be considered depending on the risks faced by a company.
- Assured v Assured – this exclusion can be present in some policies, but most insurers now provide cover.

Company Entity Employment Practice Liability

What is Employment Practice Liability coverage?

In general, the coverage is designed to cover the defence costs and damages resulting from claims for wrongful employment practices brought by past, present or prospective employees against an organisation.

As a result of increased UK employment legislation, the possibilities for employment actions against businesses are multiplying.

Many staff are aware of their rights, and they can be quite prepared to take formal action against their employers if they think these rights have been breached, even if a breach has been unintentional.

Compensation awards are reaching six, even seven figures in the UK, setting precedents and giving employees everywhere a context for their grievances. Of course, outside the UK, companies with any kind of US exposure face the full force of class actions and history of huge settlements ("normal" for domestic US businesses who understand EPLI, but potentially devastating for a growing UK company, with say a small US outlet).

Employees are getting more litigious.

Our experience shows that employment tribunal cases have increased. But we also know that in reality businesses faced a lot more employment actions than that because so many are settled in private without ever getting to the tribunal.

Growing legislation.

Today there is a broad range of legislation for businesses to keep track of such as age or religious discrimination. Strict enforcement of areas like sexual discrimination is reflected in the number of cases. Insurance helps protect the company and management by meeting damages, judgements, settlements and defence costs for many types of violations.

Managing your reputation.

A public case can be bad for the reputation of the company and its directors. Some policies can provide access to public relations teams to help manage your public image.

The financial costs are rising.

Cases are getting more expensive as the caps on awards are increased each year, they are unlimited in discrimination cases. Your business needs to cover itself against defence costs and some policies may also pay the employees' costs as well if they lose the case.

Can your management keep up?

Much is expected of employers in their handling of employee actions and the burden of proof lies heavily with the employer. Strictly defined procedures must be followed otherwise the case could be lost from the start by default.

It takes a lot of effort to keep up with ever changing rules and procedures, and you should consider protection against even innocent slip-ups. As many policies offer a legal referral service these can be a great benefit when an issue arises.

Research support.

The company and its subsidiaries may use the services of an independent expert who will work to clarify the circumstances of an actual or alleged wrongful act involving an employee. Many policies take a wide interpretation of who an 'employee' is.

Who should take Employment Practice Liability coverage?

Any company with employees wanting a higher degree of protection against the tide of ever increased UK employment legislation and feel they would benefit from the an experienced partner in defending and advising on employment issues. In many cases coverage can be taken as an extra section under a directors and officers policy.