

BE ALERT AND PROTECT YOUR DIRECTORS AND OFFICERS

As the COVID-19 pandemic has developed, organisations have felt significant impact, which is likely to lead to fluctuations in financial performance.

Senior management accountability has increased, and directors and officers have had to react quickly regarding the organisation, and its customers and suppliers. But as well as trading and operation, management has a duty of care to their workforce.

The global economy faces massive challenges from coronavirus, which could cause the largest ever global recession. The effects will be profound, and it is vital that managers behave responsibly, ensuring that no avoidable harm comes to consumers and employees.

The robustness of an organisation's disaster recovery and contingency planning will be tested – utilising back-up sites to maintain operations during interruptions, locating employees across different sites and home locations, or relying more heavily on technology.

Despite the unprecedented external factors, responsibility will ultimately fall on how senior managers responded.

We discuss the Management Liability exposures and coverage issues arising from COVID-19 and why this is such a critical time for companies to consider protection.

Types of Claims

Policy wordings will come under scrutiny to see whether a notification of the circumstances is specified, and whether certain types of exclusion could cause an impact. Therefore, if senior managers make the wrong decisions now, they might face future claims, such as;

- **Shareholder derivative claims:** When it is deemed that senior management are in breach of their financial duties to their shareholders.

- **Investor claims:** This will examine the effectiveness of a management response following a fall in share-prices or scrutiny of company disclosures.
- **Wrongful trading claims:** This happens when a director is held liable when a company has gone into an insolvent liquidation or administration.

We anticipate a significant number of COVID-19 related claims, which could include;

- Allegations of discrimination, unfair or constructive dismissal
- Whistleblowing/retaliation
- Poor or inconsistent communication to employees
- Failure to have adequate systems and technology in place
- Failure to comply with legislation and regulation
- Supply chain weakness
- Lack of cyber resilience capabilities
- Weak checks and/or preventative measures in relation to fraud
- Inadequate arrangement of insurance

“Whether due to the current climate or a number of other contributory factors, there has never been a more important time to consider the protection management liability insurance provides. One thing is for sure, cover is only likely to become more restrictive and more expensive as time goes on and we see the true fallout from this crisis.”

Geoff Hall
Chairman
Berkeley Alexander

Coverage available

Directors and Officers Liability Insurance

Directors and Officers Liability (D&O) insurance is intended to provide protection for directors and officers from investigations and claims arising from decisions taken by them in their capacity as a director or officer of the company. The policy will be triggered by allegations that a director or officer has committed a “wrongful act”.

In the case of COVID-19, if a director or officer faces a claim alleging their contingency planning was unsatisfactory or that inappropriate management decisions were made, any D&O policy in place might be triggered. The specific terms and conditions must be considered to determine whether a claim relating to decisions arising from COVID-19 may be covered.

Please note however, as D&O is a ‘Claims Made’ cover, not claims occurring, it only covers claims and/or circumstances notified to insurers during the ‘policy period’ but please note, the cover includes a Retro-active date which is usually the inception of the policy. Therefore, the sooner cover is put in place the better as claims in respect of actions taken before the policy inception date would not be covered.

Employment Practices Liability Insurance

Employment Practices Liability (EPL) insurance provides cover for claims alleging employer or third-party violations of employment law. This includes any type of discrimination, sexual harassment, wrongful termination or deprivation of a career opportunity brought by employees, former employees, or potential employees.

An EPL policy will likely cover investigation and defence costs, along with compensation that might ultimately be payable.

The specific terms and conditions should be considered carefully to determine whether cover for claims arising from actions taken in relation to COVID-19 is available and likely to respond.

Corporate Legal Liability Insurance

Corporate Legal Liability (CLL) covers the organisation against a wrongful act. Cover includes defence costs (and potentially awards) associated with events including breach of contract, the maladministration of a company pension or employee benefit claim, breach of data protection, corporate manslaughter, health and safety, taxation or other regulatory claims.

The introduction of the Corporate Manslaughter and Corporate Homicide Act 2007 has put a spotlight on CLL insurance, which can generally only be purchased alongside D&O coverage.

A changing market

The market is turning to insolvency exclusions as companies in stressed sectors struggle to obtain full coverage at an affordable rate. The existence of insolvency exclusions predates the crisis, but has become more widespread, with underwriters anticipating a slew of claims.

This latest evidence of tightening in the market represents a significant reduction of coverage, potentially leaving the personal assets of the directors at risk.

When considering cover under a Management Liability policy, the simplest and safest rule of thumb is that the intention of the policy is likely to be to cover future actions and decisions of the company, and its directors and officers. However, it might be wise to purchase protection before exclusions are explicitly applied across the entire market.

The information contained in this bulletin is based on sources that we believe are reliable and should be understood as general risk management and insurance information only. It is not intended to be taken as advice with respect to any specific or individual situation and cannot be relied upon as such.

For more information contact your **Berkeley Alexander Advisor**