

Coronavirus (COVID-19) – Insurance Update 4

Following on from our previous Coronavirus Updates, the following information primarily deals with liability issues with coronavirus prevention measures as we come out of lockdown and staff return to work.

If you missed our three earlier updates, these can be accessed via this link [Coronavirus Updates](#)

Liability Insurances – Am I covered if an employee catches COVID-19 at work?

The answer is almost certainly yes and subject to the normal conditions of your policies, you will be covered by your Employers Liability insurance in respect of liability to employees arising from COVID-19.

However, the above confirmation is on the basis that you have given your insurers a ‘fair presentation of risk’ about your business activities. This is a legal duty and you are required to tell them of any changes. Insurers have confirmed that they do not expect notification of the additional risks associated with social distancing and hygiene at work premises and sites because of coronavirus, however, we would ask you to contact us if you are engaging in activity that an insurer could deem high risk, such as cleaning or maintenance in COVID-19 hospital wards.

Protecting Employees

There has always been a duty of care to protect people from harm, but the threat of coronavirus now adds the complications of social distancing, enhanced hygiene arrangements and the need to account for those who are either vulnerable themselves or have vulnerable relatives.

Whilst Employers Liability insurance will provide cover, insurers will expect compliance with the coronavirus advice and guidelines issued by the Health and Safety Executive (HSE) and they have said that they expect businesses to take ‘reasonably practicable’ steps to protect their employees, but not those that are grossly disproportionate to the risk. That will mean following the same approach as other health and safety risks by undertaking risk assessments, creating proportionate controls and safe systems of work and following relevant health and safety legislation. These measures should be monitored and reviewed and apply to all working environments including your premises, site work, deliveries and where relevant travel arrangements.

There is a lot of information on the HSE [website](#) regarding a range of measures including risk assessments, hygiene, PPE, signage, updating procedures and health and safety policies etc and also taking account of mental health and wellbeing issues.

In addition to the information available for the HSE, many firms will obtain trade specific advice from the likes of trade and industry bodies or associations, but a number of insurers have also produced a range of useful information, some generic and some sector specific, which we are happy to provide on request.

It is vital all preventative measures taken should be documented and staff required to sign that they have received training, updated procedures, PPE etc. which can be used as evidence should it be necessary to defend claims for compensation.

Protecting others – Public and Products Liability cover

Aside from employee safety, you also have a duty to prevent harm to others and you will need to consider contact and interactions with other parties including customers, suppliers and the general public. These will include:

- Site work
- Visits to customers' and suppliers' premises
- Customers and suppliers visiting your premises
- Products – despatch and delivery
- A higher level of care for customers who are 'shielded' or in the vulnerable category.

The protective measures you need to consider will be similar to those for your employees and again, there are guidelines on the HSE [website](#).

As regards insurance cover, the majority of Public and Products Liability policies will provide cover in respect of liability to third parties. A few insurers are applying exclusions or restrictions as policies become due for renewal, particularly in high risk areas such as the care sector and we will ensure that any restriction or exclusion is brought to your attention and offer alternatives with COVID-19 cover where possible.

How likely are claims?

To succeed with a claim against you, any claimant would need to prove that

1. they caught the virus as a result of the activities of your business
2. it was a result of your negligence (a breach of your duty of care to protect people)
3. the claimant has suffered death, injury or financial loss.

The most likely source of claims will come from your employees, as generally, they should find it easier to link their catching of the virus to your business, although at present, it is not clear what level of proof will be required for claims to be successful.

The obvious problem is that so much relating to COVID-19 is unknown with the science and recommended safety measures changing all the time. It is also unclear how far liability will go, i.e. could you be held responsible if an employee infects a family member?

The main concern will be what 'reasonably practicable' measures actually means should cases come to court and there is always the suspicion that by the time legal cases are brought the 'benefit of hindsight' will be applied retrospectively and some employers measures will be deemed insufficient.

No doubt a few test cases will be needed before we know more but unfortunately the scene does seem set for ambulance chasing lawyers advertising 'did you catch COVID-19 at work', so the need to undertake risk assessments and document everything is vital to defend claims.

Employment Disputes - Legal Expenses Insurance

Hopefully, claims relating to death or injury from coronavirus will be a rarity, however, it is likely that many firms will have difficulties or disputes with staff arising from coronavirus ranging from

furloughing, redundancy, a reluctance to return to work or the introduction of new working practices and changes to contracts.

You may have a Legal Expenses or Employment Practices Liability policy in place to meet the legal costs of defending employment disputes and pay compensation should your defence be unsuccessful.

Some commercial combined or package policies also include legal expenses cover, either as part of the package or an optional extra. Generally, these are low-cost options where cover is not as wide as standalone policies, but they will usually include cover for Employment disputes (although the types of disputes covered may be more restrictive) for legal defence costs.

However, most Legal Expenses policies are subject to a range of conditions that can include early notification of potential claims and taking advice from a legal helpline either before starting an action against an employee or responding to an allegation. The exact conditions will vary from policy to policy, but please check them in advance (where possible) or when you are first aware of a dispute.

Please also note that free legal advice is often available as part of commercial insurance policies. All Legal Expenses policies will provide a free legal helpline for advice, as will many other commercial policies, even if Legal Expenses cover is not included.

Policy Renewals

As explained in our earlier updates, other than travel and liability insurances there is very little insurance cover for pandemics. The wordings of some policies that do potentially provide cover, particularly those for Business Interruption, are subject to dispute and the Financial Conduct Authority (FCA) is taking the unprecedented step of testing many of the key issues relating to the policy wordings in court. In view of the uncertainty surrounding some policies, most insurers are changing their wordings to make their intentions clear about cover for pandemics and specifically COVID-19. The changes apply as policies fall due for renewal.

As is often the case when a risk emerges with global consequences, (cyber and terrorism are other examples), insurers tend to apply exclusions to mainstream policies and cover then becomes available from specialist insurers. In the case of coronavirus and particularly for Business Interruption, it is more a case of reinforcing the exclusion of cover, but we are seeing changes to a number of classes of insurance. A summary of the main classes of insurance is as follows.

Business Interruption – full exclusion

Employers Liability – no exclusion

Marine/Transit – full exclusion

Property/Material Damage – full exclusion

Public/Products Liability - A few insurers are applying exclusions or restrictions, particularly in high risk sectors such as the care sector and we will ensure that any restriction or exclusion is brought to your attention and offer alternatives with COVID-19 cover where possible.

Travel – full exclusion other than the following.

- Cancellation cover for trips booked prior to the Coronavirus restrictions coming into force.
- Future trips should provide medical expenses cover if coronavirus/COVID-19 is contracted abroad, however, this will be after the current Government travel ban ends. At present, policies will not cover trips if you travel against the advice of the Government, unless cover has been agreed in advance with the insurer.

Directors and Officers (D&O) – some but not all insurers are imposing a full exclusion. At present, the full exclusion tends to be on lower premium ‘online package’ type policies. With larger premium cases which are underwritten individually, insurers are asking for additional information before deciding whether they can offer COVID-19 cover. It is early days, but what we have seen so far tends to support a ‘2 tier’ approach with cover available, at a price.

It is concerning that some insurers are excluding all COVID -19 related claims from Directors and Officers policies as they come up for renewal thus removing cover for directors’ decisions relating to the crisis, when for the vast majority of our clients, the most likely source of D&O claims would come from employment or health and safety matters, especially as some could involve criminal sanctions. This is even more relevant as D&O policies are on a ‘claims made’ basis (cover needs to be in force at the time a claim is first made rather than when the alleged wrongful act occurred), meaning the exclusion of COVID-19 at policy renewal which intervenes between the time of the event and the time of the claim would exclude cover.

We will ensure that any restriction or exclusion is brought to your attention and offer alternatives with COVID-19 cover where possible.

We regard D&O insurance as an essential means of defending directors (and their personal assets) in relation to claims of wrongful acts as a director, but for those not familiar with the cover further information is available here. [Directors and Officers Factsheet](#)

Personal Accident/Sickness - some but not all insurers are imposing a full exclusion and we will ensure that any restriction or exclusion is brought to your attention and offer alternatives with COVID-19 cover where possible

Professional Indemnity – some but not all insurers are imposing a full exclusion. Whether this will be a concern will depend on the ‘professional activities’ covered by the policy and if these are related to coronavirus/COVID-19. We will ensure that any restriction or exclusion is brought to your attention and offer alternatives with COVID-19 cover where possible.

Liability Declarations and Mid Policy Year Changes

Some policy premiums (or elements of premiums) are based on estimated figures provided at inception or renewal. Employers Liability premiums are generally based on wages, Products Liability on turnover and Public Liability can be based on wages, turnover or a combination of the two. Business Interruption is also often based on an estimate of gross profit or revenue. By contrast, Property or Material Damage covers will be fixed amounts based on value or the cost of reinstatement.

Many policies allow a premium adjustment following a declaration of wages, turnover, gross profit or revenue at the end of the policy term and rebates may be available at that time. Please note many policies with declaration adjustment clauses will be subject to a minimum retention, but a



number of insurers are being very flexible given the unprecedented circumstances of this crisis and allowing rebates even when a policy is not adjustable.

We will discuss any potential rebates with you at the time of your renewal and a few insurers are also now prepared to allow adjustments to be made to estimates mid-policy year.

Please note that the information in this factsheet is generic advice but if you require more information about your own policies, please speak to your usual Nsure contact.

Additionally, we have a range of factsheets on our [website](#) with useful information about various types of insurance including Business Interruption, Cyber, Directors and Officers, GAP, Intellectual Property, Professional Indemnity and Terrorism. There is also advice on underinsurance and write-offs.