



DIRECTORS AND OFFICERS FACTSHEET

What is directors and officers liability insurance and why is it needed?

As a director you are legally required to act with care, in good faith and within the law. You have a duty to act in the best interests of the company, including a responsibility to ensure that other directors do likewise. If you don't, you face a fine, imprisonment and compensation for damages that could involve the seizure of personal assets. And it is not just directors that face claims, company officers and senior managers also have a personal liability for their actions.

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 you are sued.

A Directors and Officers (D&O) policy provides protection for 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.

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?

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.

Who is a director or officer?

Directors – The legal definition 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 can be open to legal challenge.

Officers - the legal definition of an officer is less clear 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?

- Government Departments/Regulators alleging breach of regulations e.g. health and safety, data protection, bribery act, competition law, export, corporate manslaughter, wrongful trading, failure to disclose information
- Employees (past or present) alleging breach 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
- The company itself

How does cover operate?

Cover is provided on a claims made basis – cover for claims made (and reported to the insurer) during the period of insurance only. 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 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.

Is there an excess?

Most insurers do not apply an excess unless the policy jurisdiction is extended to cover claims from the USA.



What are the key benefits of a d&o policy?

Cover for directors and officers against their personal legal liability arising from any 'wrongful act' committed in their capacities as directors or offices of the company

The policy also covers 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 the defence of a civil or criminal proceeding 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.

Most Policies include extensions for:

- Entity cover – defence costs only. The company is typically sued at the same time as the director or officer and this avoids arguments over allocation of the defence costs between the parties.
- Outside board coverage (ie 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 certain criteria)
- Extended discovery period - when a policy is cancelled, generally a period of 30 days is allowed for claims to be made. Longer periods may be available for an additional premium
- Spouse extension - protects the spouse/heirs in the event of the director/officer's death or if by law the claim liability is passed on to the spouse ie where assets such as a house are jointly owned by the director/officer and spouse
- Non-Executive directors
- Employment Practices Liability (usually subject to an additional premium)

What is excluded?

- 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 (claims or circumstances notified prior to inception)
- Acting as a trustee of a pension scheme (specialist cover needs to be arranged)
- North American claims (unless the policy has been extended)



- Bodily injury, property damage and professional duties to a third party (these risks should be covered by Employers Liability, Public Liability, Material Damage or Professional Indemnity Policies), unless the claim is from a shareholders relating to the value of the company's share capital.
- Pollution cover can either be limited or completely excluded and should be considered depending on the risks faced by a company.
- Assured v Assured – this exclusion can be present in some older style policies, but most insurers now provide cover.

Other important information you should know

Who can buy a D&O Policy - The company is allowed to purchase a D&O policy to protect both the company and its directors, provided; Its Articles of Association permit it to do so and the existence of the policy is declared in the Annual Report.

Subsidiary Companies - Policies should be issued in the name of the ultimate holding company and will then cover the directors and officers of all wholly owned subsidiary companies.

If you sell your Company – D&O policies automatically goes into 'Run-Off' once a company is sold or its assets cease to exist. The acquiring company will arrange cover for acts occurring after the change of control and either the selling or acquiring company can arrange run off cover to protect the directors and officers for acts prior to the sale. It is important to establish who will take responsibility for the run off cover before the sale is completed.

Retroactive date – most policies automatically provide cover for wrongful acts that occurred prior to 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 Policies – This factsheet deals with policies effected by a company, however, policies can be arranged to cover an individual in their capacity as a director/officer of a number of companies.

Directors and Officers Insurance can be complicated and we have tried to deal with the main issues here, but please feel free to fully discuss your individual requirements with Stewart Murray on 01903 520200 or email stewart.murray@nsure.co.uk