




Directors' Liability Survey 2022

Employment practices liability exposures – COVID-19's lingering impact?

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We have slowly begun to emerge from the pandemic and over the past two years we have seen the impact of COVID-19 affect all sectors of society. 59% of all survey respondents around the world view COVID-19 and lockdown measures as either 'very' or 'extremely important' and it remains a topic of interest for directors and officers.

While each region in the survey found COVID-19 and lockdown measures were a 'very significant' or 'extremely significant' risk for their organization's business operations, in North America 62% of individuals surveyed believed COVID-19 and lockdown measures were either 'very significant' or 'extremely significant.' This was the third largest risk after economic climate and cyber attack.

The focus respondents gave to COVID-19 and lockdown measures is not surprising, with the U.S. having seen vaccine mandates implemented by the Government and subsequently challenged in the court system, until a recent ruling was eventually issued by the U.S. Supreme Court.

One of the most intensely scrutinized matters in the second half of 2021 was the Department of Labor's Occupational Safety and Health Administration's (OSHA) COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS). This would have mandated COVID-19 vaccinations or at least weekly testing for workers at companies in the U.S. with 100 or more employees by January 4, 2022, subject to legally required accommodations. On January 13, 2022, the U.S. Supreme Court issued a stay of OSHA's ETS.

Employers not covered by another federal, state, or local mandate may choose to implement whatever policies and practices are best suited to the unique needs of their workplace.

Employers choosing to maintain workplace vaccination policies must still follow other applicable laws, such as Title VII and the Americans with Disabilities Act, and be cognizant of the requirements in their specific state, as several states have enacted measures that either restrict or impact vaccination requirements.

Many of the EPL claims coming out of the pandemic have been in relation to failure to accommodate based on religion or disability. A religious or medical accommodation is often requested by an employee when a conflict arises between a specific task or position the employee cannot fulfill due to a medical or religious reason.

Today, this means a vaccine mandate may create the need for an accommodation where an employee cannot fulfill that requirement due to medical or religious reasons and this is an issue which employers will need to navigate through the guidance of legal counsel.

While COVID-19 claims continue to manifest, these are not the only employment claims companies are facing, with 35% of respondents saying they found the risk of employment claims for their directors and officers (whether reputationally or financially) 'very significant' or 'extremely significant'. This risk was highest in the energy and utilities sector at 40%. By slight contrast, in our 2021 survey, 38% of respondents found the risk of employment claims 'very or extremely significant.'

In addition to COVID-related claims, we anticipate the following factors may lead to increases in employment claims throughout 2022:

- In 2021 various states and localities passed new laws restricting the use of non-competition agreements. On a federal level, the Federal Trade Commission is considering whether to exercise its rule making authority to curtail use of non-compete clauses.
- As return-to-work and hybrid scheduling continues in 2022, considerations around how employers monitor productivity without breaching privacy and confidentiality issues may become a bigger issue.
- We may see more court filings of claims of sexual assault or harassment. Recently, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. The Act amends the Federal Arbitration Act (FAA) to give employees who are parties to arbitration agreements with their employers the option of bringing claims of sexual assault or sexual harassment either in arbitration or court.

G.B. - Chris Holmes

It is notable the perception of risks for directors and officers in relation to return to work/COVID-safety/vaccination status is relatively low for G.B. at 11%. This compares with 25% for Europe and 38% for North America, and 51% for Asia.

The statistics also show COVID-19 and lockdown measures were ranked at 47% in terms of significance for G.B., which is the lowest percentage ranking amongst the regions and perhaps due to the U.K. Government's approach to lifting lockdown restrictions and its plans for living with COVID.

The perception of risks for directors and officers in relation to risk of employment claims is also relatively low for G.B. at 14%, in comparison to 28% for Europe, 38% for North America, and 50% for Asia. This may be related to differing employment claims cultures and/or employment protection regimes across the regions.

Key employment-related perceived risk areas for businesses in G.B. include data protection/loss, health and safety, regulatory risk, and climate change issues.

From our experience, diversity, equality, and inclusion are further key employment-related areas of focus for businesses operating in the region.

G.B. - Richard Multon

In terms of the London insurance market, EPL is still very much an ancillary line alongside D&O. Although there have been a few new markets to announce that they will now consider writing EPL, they will only do so alongside participation of the D&O. More appetite for excess layers is appearing, but is heavily dependent on retention level, sector, attachment point, and exposure to the U.S.

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