

The COVID-19 Pandemic, Management Liability and Directors' & Officers' Liability

What you need to know

The unprecedented coronavirus (COVID-19) pandemic has impacted every major economy and industry and the local and global insurance market is no exception. The immediate challenges associated with the pandemic and the resultant economic downturn are likely to bring lasting effects to the insurance marketplace. Insurers are reviewing the coverage provided under their range of products and governments are introducing new laws which directly and indirectly impact risk and insurance. The situation is constantly evolving and Willis Towers Watson is collaborating globally to consider the insurance implications.

As the situation continues to change, directors ought to consider a range of direct and indirect operational and financial risks likely to be relevant, including:



supply chain interruption risks and other business impacts arising from the spread of COVID-19;



obligations to protect the health and safety of employees and visitors, including new risks arising from dispersed teams and remote working environments;



contractual and financial obligations;



the organisation's overall liquidity and its ability to financially recover;



the organisation's increased cyber security exposures;



rapidly changing regulatory powers enacted by government to address the crisis.

The economic impact of COVID-19 is severe, requiring boards to consider the financial viability of their organisations, implement any immediate measures to navigate the crisis and test the robustness of their crisis management response and business continuity plans.

Organisations with public disclosure obligations should be evaluating the degree of materiality of any direct or indirect risks presented by the spread of COVID-19 and the extent to which such risks should be disclosed. From the perspective of Directors' and Officers' (D&O) insurance, inadequate disclosure involving the business impact of COVID-19 is now giving rise to securities litigation in the United States. With litigation funders actively operating in this region, we anticipate similar actions may be filed here.

We urge organisations that face the potential of their operations or financial results being impacted by COVID-19 to consult with their legal advisers on the scope and timing of advisable and necessary disclosures. In addition, organisations should confer with their insurance brokers to review their D&O programs – and any and all other impacted corporate insurance programs – including program structures and policy wordings. Such proactive measures can enhance the likelihood of comprehensive policy recovery should a claim arise.

The impact of COVID-19 on the renewal of a D&O or Management Liability program should also be carefully considered. Insurers are increasingly seeking additional information from boards to assist them to evaluate rapidly changing risk profiles and set appropriate premiums and conditions. In some cases, insurers are withdrawing appetite for covering organisations operating in certain industry sectors that are most heavily impacted by COVID-19. Whilst there is no consistent approach at this stage, we foreshadow insurers may seek to impose coverage restrictions moving forward. Preparing well and engaging early with the support and active guidance of your insurance broker will help to facilitate the best outcome.

What is typically covered?

- Compensatory damages and defence costs arising from a claim alleging a wrongful act, error or omission by directors and officers in the course of carrying out their duties;
- Attendance at formal investigations or inquiries;
- Legal costs arising from a regulatory investigation into an actual or alleged work health and safety breach; and
- Resultant civil fines or pecuniary penalties where permissible at law.

Some policies may provide a small amount of cover for mitigation costs or the cost of an independent crisis management consultant to minimise the adverse effects of a crisis event, that if left unmanaged, could have the potential to significantly decrease the organisations consolidated annual revenue.

A reminder about claims

With business changing rapidly in response to the COVID-19 crisis, it is worth remembering that this type of insurance is written on a "claims made and notified" basis.

This means an organisation must notify their insurer of any known claim or any circumstance that could give rise to a claim before the policy period expires. Once the policy has expired, no claims or circumstances can be notified under it.

Please contact your insurance broker for further guidance on how to notify a claim or a circumstance that could give rise to a claim.

What is not covered?

Management Liability policies often have financial impairment or insolvency exclusions.

Other common exclusions in both Management Liability and D&O Liability policies may include:

- any direct claim for bodily injury – noting the scope of this exclusion can vary between policies;
- any punitive, aggravated or exemplary damages;
- taxes or any employment related benefits or entitlements; or
- wilful or intentional acts or omissions, including deliberate breach of any law.

For further information

The Willis Towers Watson FINEX team can assist in interpreting coverage and help you manage this risk within your organisation. Please get in touch with your broker or consultant for further information.

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