

## U.K. EMPLOYERS' LIABILITY - A GUIDE

Most U.K. employers are required by law to insure against liability for injury or disease to their employees arising out of their employment. This *Alert* reviews what is required.

### WHAT IS EMPLOYERS' LIABILITY INSURANCE?

Employers are responsible for the health and safety of their employees while they are at work. Employees may be injured at work, or they may become ill as a result of their work while employed. They might try to claim compensation if they believe their employer is responsible. The Employers' Liability (Compulsory Insurance) Act 1969 ensures that employers have at least a minimum level of insurance cover against any such claims.

Employers' liability insurance enables employers to meet the cost of compensation for their employees' injuries or illness whether they are caused on or off site. Any injuries or illness relating to motor accidents which occur while employees are working may be covered separately by motor insurance arrangements.

You can be fined if you do not hold a current employers' liability insurance policy that complies with the law.

### IS EMPLOYERS' LIABILITY INSURANCE REQUIRED IF EMPLOYEES WORK ABROAD OR THE COMPANY IS BASED ABROAD?

If employees are normally based in England, Scotland or Wales (including offshore installations or associated structures) employers must have employers' liability insurance.

You do not need employers' liability insurance under English law to cover employees who are based abroad (e.g., if they are on secondment).



However, the law in the country where they are based may require employers to take out insurance or take other measures to protect their employees.

If any employees are normally to based abroad but spend more than 14 days continuously in Great Britain, or more than seven days on an offshore installation, their employer will need employers' liability insurance under English law.

### HOW MUCH COVER IS REQUIRED?

All companies (subject to an insurance requirement; see below) must be insured for at least £5 million. However, look carefully at risks and liabilities and consider whether

## WHICH INSURANCE COMPANIES CAN SELL EMPLOYERS' LIABILITY INSURANCE?

You must use an authorized insurer. If you do not, you may be breaking the law. Make sure your insurer is authorized before taking out employers' liability insurance.

Authorized insurers are individuals or companies working under the terms of the Financial Services and Markets Act 2000.



insurance cover of more than £5 million is necessary. In practice, most insurers offer cover of at least £10 million any one occurrence (inclusive of costs and expenses), reducing to £5 million for Terrorism.

Typically, policies will extend to provide an indemnity for legal fees and any prosecution costs awarded in respect of the defense of criminal proceedings brought against you or your employees for an offense under the Health & Safety at Work etc Act 1974.

If a business is part of a group, a policy for employers' liability insurance can be taken out for the group as a whole. In this case, the group, including subsidiary companies, must have cover of at least £5 million.

## WHO DOES THE LAW APPLY TO?

You need employers' liability insurance unless you are exempt from the Employers' Liability (Compulsory Insurance) Act. The following employers are exempt:

- Most public organizations, including government departments and agencies, local authorities, police authorities and nationalized industries
- Health service bodies, including National Health Service trusts, health authorities, primary care trusts and Scottish Health Boards
- Certain other organizations financed through public funds, such as passenger transport executives and magistrates' courts committees
- Family businesses; however, this exemption does not apply to family businesses which are incorporated as limited companies
- Any company employing only its owner where that employee also owns 50% or more of the issued share capital in the company

Further exemptions from the requirement for employers' liability insurance are listed at § 3(1)(a) and § 3(1)(b) of the Employers' Liability (Compulsory Insurance) Act 1969, and Schedule 2 to the 1998 Regulations.

## DO EMPLOYERS NEED INSURANCE FOR ALL THE PEOPLE WHO WORK FOR THEM?

Employers are only required by law to have employers' liability insurance for people in their employ. However, people normally considered self-employed may be deemed employees for the purposes of employers' liability insurance.

Whether or not you need employers' liability insurance for someone who works for you depends on the terms of your contract. This contract can be spoken, written or implied.

No hard and fast rules govern who counts as an employee for the purposes of employers' liability insurance. The following may offer some indication. However, if you have any doubts, you should seek legal advice.

In general, employers' liability insurance is required if, as their employer:

- You deduct national insurance and income tax from the money you pay them

- You have the right to control where and when they work and how they do it
- You supply most materials and equipment; you have a right to any profit your workers make although you may choose to share this with them through commission, performance pay or shares in the company (similarly, you will be responsible for any losses)
- You require that person only to deliver the service, and they cannot employ a substitute if they are unable to do the work
- You treat that person the same way you treat other employees; for example, if that person does the same work under the same conditions as someone you employ

In general, you may not need to provide liability insurance as their employer if:

- They do not work exclusively for you (for example, if they operate as an independent contractor)
- They supply most of the equipment and materials they need to do the job
- They are clearly in business for personal benefit
- They can employ a substitute when they are unable to do the work themselves
- You do not deduct income tax or national insurance

In most cases an employer will not need employers' liability insurance for volunteers. Although, in general, the law may not require employers to have insurance for:

- Students who work for them unpaid
- People who are not employed, but taking part in a youth or adult training program
- A school student on a work experience program

## **CORPORATE MANSLAUGHTER ACT AND CORPORATE HOMICIDE ACT 2007**

This Act, effective April 6, 2008, clarifies and defines criminal liabilities of companies where the way in which activities are managed or organized results in a fatality.

Companies that are successfully prosecuted will face a fine with no upper limit. Most employers' liability insurers are providing an extension of their existing criminal defense cover in relation to the Act (the limit of indemnity provided will vary from insurer to insurer).

## **THE REPORTING OF INJURIES, DISEASES AND DANGEROUS OCCURRENCES REGULATIONS 1995 (RIDDOR 1995)**

RIDDOR 95 requires the reporting of work-related accidents, diseases and dangerous occurrences. The reporting requirements are strict:





- If there is an accident connected with work and your employee or a self-employed person working on your premises is killed or suffers a major injury, you must notify the Health and Safety Executive (HSE) without delay.
- If there is an accident connected with work and your employee, or a self-insured person working on your premises, suffers an injury lasting longer than three days, you must send a completed Accident Report form to the HSE within 10 days.
- If a doctor notifies you that your employee suffers from a reportable work-related disease, you must report this to the HSE.
- If an incident occurs which does not result in a reportable injury, but which clearly could have, then this incident will also need to be reported.

## RETAINING COPIES OF CERTIFICATES

You must retain for at least 40 years copies of certificates of insurance which have expired.

These requirements apply only to policies that were in force on December 31, 1998 or later. However, it is still very important to keep full records of your previous insurance in case any of your employees make claims relating to injuries or illness caused in the past.

One of the recurring problems respecting employers' liability insurance is the 'long tail' industrial disease claim – where an illness (such as asbestosis) does not become apparent/remains undiagnosed for many years after the initial exposure to the causation factor. Identifying the correct insurer to handle the claim can be complicated and needs to take into account the latency period (time between exposure and development of symptoms). If the

appropriate insurer cannot be traced, the company may well be ultimately responsible for the loss.

## WHAT HAPPENS IF EMPLOYERS' LIABILITY INSURANCE IS NOT IN PLACE?

The Health and Safety Executive (HSE) enforces the law on employers' liability insurance, and an HSE inspector will check that employers' liability insurance is in place with an approved insurer for at least £5 million.

Employers can be fined up to £2500 for **any day** they are without suitable insurance. If they do not display the certificate of insurance, or if they refuse to make it available to HSE inspectors when requested, they can be fined up to £1000.

## MARKET CONDITIONS AND PRICING

The cost of employers' liability insurance has been rising due to factors such as:

- Society's increasing claim consciousness and legal changes
- Wider financial market conditions

While these factors will inevitably affect premium levels, other factors influencing the premium paid include:

- The nature of the business activities
- Loss history – claims and accidents
- Management of health and safety risks

Large companies are primarily rated on their claim experience, where this is statistically significant.

Other companies will be ‘book rated.’ In this method the nature of work carried out is used to find the ‘base rate.’ This rate will have been previously established by insurer’s past claim experience for the trade overall as well as being influenced by data provided by the HSE.

An insured’s individual contribution is then determined by applying multipliers or factors to the rate to reflect the size of the business in terms of numbers employed, past claim experience and health and safety management system quality.

## CLAIM PROCEDURE

In the event of an accident in the workplace, it is useful to make a written note of the basic facts and retain all evidence on any incidents, such as:

- Incident/near miss report forms
- Accident book entry
- First-aider report
- Safety officer report
- Health & safety executive documentation
- Photographs/sketch plans
- Security videos

The Woolf Reforms came into effect on April 26, 1999 and had far reaching consequences in the way in which employers’ liability claims had to be administered, as follows:

1. The claimant has to send two copies of a “pre-action” letter giving full details of the incident, e.g., location, date and why they hold the employer responsible, etc.
2. The employer must respond to the “pre-action” letter within 21 days, identifying their insurer.
3. Within 90 days of the acknowledgement insurers must respond to the letter of claim, either accepting liability or declining the claim.
4. If the claim is repudiated insurers must forward to the claimant or their legal representatives any documentation supporting the repudiation.

## FAILURE TO COMPLY WITH THESE DEADLINES ENABLES THE CLAIMANT TO GO STRAIGHT TO LITIGATION WITHOUT PENALTY; IN ADDITION TO WHICH SANCTIONS AGAINST THE EMPLOYER WOULD BE MADE ON LEGAL COSTS AND THE EMPLOYER WOULD BE PREVENTED FROM DEFENDING THE CLAIM.

It is therefore imperative that:

- All claims/incidents likely to give rise to a claim are reported IMMEDIATELY
- A claim form is completed as quickly as possible and returned to your insurer

In sum, employers’ liability is both a significant exposure and a compulsory insurance for almost any company operating in the U.K. Multinational companies are well advised to pay close attention not only to the insurance but equally to the risk control and the claim measures that will protect their workers and control their costs.

## CONTACT

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