



COVID-19: Executive Liability Issues in Canada

The coronavirus has become a global pandemic and is causing a major disruption to businesses across Canada. As companies look to their property and casualty insurance policies to respond, they're also asking about executive liability coverages like Directors and Officers Liability, Employment Practices Liability, and Cyber/Privacy Liability policies. How would these policies respond to event-driven litigation like a pandemic and what issues should companies consider?

Directors and Officers Liability

There are two main types of allegations that the D&O market is experiencing in the early days of the pandemic:

- **Risk factor disclosure.** As with all disclosure, Canadian securities legislation and guidance generally encourage issuers to avoid vague or generic disclosure. Company-specific disclosure that helps investors to understand how they may be impacted by risks such as COVID-19 is essential. Public issuers should continue to monitor how COVID-19 could impact their business and update disclosure if and when required. Because the relative issues are moving so quickly, companies are having a tough time assessing the potential impact on their stakeholders, leaving directors and officers exposed to the potential for litigation. For public filers, failure to provide adequate 'risk factor' disclosures could invite litigation from investors in the event of a stock drop.
- **Lack of preparedness.** In the USA, claims have already emerged alleging that company boards failed to respond appropriately to drastically changing operating conditions or failed to ensure that the company was adequately prepared to deal with a situation such as a pandemic. Does this mean that companies should have alternative supply chains? Or ensure they have adequate financial reserves to deal with a disaster? Perhaps liability will arise from the lack of a robust business continuity plan? It is possible that claims from suppliers, customers, regulatory bodies, shareholders, and employees focus on those two issues, among others, including breach of fiduciary duty and financial misrepresentation.

A well-constructed D&O tower, including Side A/DIC (Difference-In-Conditions) cover, is imperative. Remember, D&O coverage is boardroom malpractice insurance. It is defense for the decision makers; it is balance sheet protection. Please request a copy of Gallagher's whitepaper on why Side A/DIC coverage is important.

Will your D&O policy respond to COVID-19 claims?

While D&O policies typically exclude bodily injury, the focus of D&O coverage is not on the physical injury aspect. Instead, it concentrates on the financial impact to the stakeholders who will ultimately drive the litigation. Thankfully there are no exclusions for being ill-prepared or not having the 20/20 hindsight that will now judge past business decisions. A D&O policy will respond to defend allegations of negligence, inadequate disclosure, misrepresentation and breach of fiduciary duty.

In Canada directors also have the protection of the business judgment rule. Questions asked will include: Did the company live up to the standard expected for a company of their size? Did they do as much as their industry peers in this situation? Or did they have their heads buried in the sand, as so often happens when data breaches arise; the "it won't happen to me" scenario?



While privately held companies do not have to adhere to quarterly earnings releases or securities commissions, private and nonprofit corporations are still accountable to many stakeholder groups: donors, private shareholders, creditors, regulatory bodies, and society beneficiaries. Boards of directors should ask themselves, did we, as a board, do everything we could to prepare for a pandemic or unforeseen crisis? Did we have a business continuity plan? Did we transfer risk wherever possible and appropriate? D&O insurance is intended to protect the individuals from allegations of inaction or wrongful acts in their capacity as an officer or director.

If my company has to file for bankruptcy, will my D&O policy respond?

Yes, if statutory obligations fall to directors personally, the D&O coverage section may respond.

Employment Practices Liability

An event like COVID-19 could cause increased exposure to employment practices claims. Canadian companies are already laying off employees. These actions could trigger employment practices liability claims, including:

- Discrimination. Employees could allege that they were selected for dismissal based on their age category or national origin
- Wrongful dismissal and constructive dismissal
- Claims for longer severance period than the statutory minimum

Defending against these allegations could be incredibly costly—even if the claims are unfounded. An EPL policy could respond to many of these allegations.

Will my EPL policy respond to a coronavirus – related EPL claim?

The answer is, “it depends”. Many policies provide defense costs for claims such as reputational damage, emotional distress, mental anguish, or OSHA claims.

Will my EPL policy cover the minimum severance owed to employees under the Employment Standards Act, if we need to conduct a mass layoff?

Probably not. EPL policies normally have exclusions for wages and violations of Canadian labour laws. Some policies have broader severance language, bridging the gap between a successful claim for a longer severance period and the reasonable amount offered to a former employee.

Would an EPL policy respond to claims for invasion of privacy if employees are questioned about their personal travel, health history or family health history? If an employee opts out of a work-related event because of concerns over coronavirus and subsequently believes that they were retaliated against, would my EPL policy cover that?

Most policies should respond to those scenarios if the definitions of ‘wrongful act’ and ‘claim’ are met.



Some Considerations for Canadian Employers:

- Consult employment counsel when updating policies and procedures.
- Ensure that those policies and procedures are implemented in a fair and equal manner.
- Maintain privacy regarding COVID-19, in terms of employees being tested, and the results of those tests.
- Give employees a confidential avenue to consult if they have concerns about their own health or the health of their work environment.
- Ensure proper communication to all employees, particularly the line managers who will be responsible for implementation.
- Make sure to keep employment files adequately documented. Communication from employees may be enough to be considered 'notice of a claim'. Please consult with your Gallagher claims professional to determine whether insurance carriers need to be put on notice.

Cyber Liability

What does cyber have to do with COVID-19?

Cyber insurance doesn't just cover data breaches, it responds to all privacy breaches. The uncertainties around privacy create a significant business challenge when a firm considers the PIPEDA act in Canada and a company's privacy obligations around COVID-19, either on a class or an individual basis. Who is being tested, and who is aware of the testing? Who has the virus and how does a company communicate that to other workers? These questions relate to privacy issues that a Cyber/privacy policy could defend, if mishandled.

Separately, as workers increasingly login from home, a host of cybersecurity issues will arise. Not every employee is experienced at remote working procedures. Is dual factor authentication in use everywhere? Are employees' home computers vulnerable to phishing? Can the network handle the increased traffic? Have companies properly trained their employees and tested procedures before sending thousands home to work? Are devices all properly encrypted and backed up? Is sensitive information now being stored on employee owned devices without proper security? Insurers can provide risk management tools and considerations.

For any questions or assistance with any of the lines of coverage discussed above, please contact your local Gallagher representative.

Authored by Dan Lewis, CFA
Management Liability Practice Leader
dan_lewis@ajg.com