

Winter 2024



Covernotes

Explaining issues that affect insurance

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Is it Covered? Legal scenarios where management liability cover stepped up

Buying a Management Liability Policy (MLP) is not just about safeguarding against the significant financial losses that can result from a tribunal or court award. A policy like this can also help prevent claims progressing as far as a court, by providing the expert legal advice that enables a business to assess how to handle allegations or situations proficiently, and in the best legal way.

This more productive approach deals with many issues, to avoid constructing a legal defence which can be a significant drain on the business and a waste of management time. Access to top-level legal advice and online resources is a good way to address legal or regulator-related risks.

But what would be covered? For instance, would an MLP policy pick up the cost of legal representation if a fleet-based business were sued by a driver whom it had dismissed, due to the discovery of a serious medical condition, despite both the Driver Vehicle and Licensing Agency (DVLA), and their doctor declaring them fit to drive? The answer was 'yes', in a real case, but the potential claim was a £75,000 award, as there was little or no defence by the time the legal team was advised of the situation. The failure to alert them also meant the insured had to pay a £10,000 excess.¹

If a business suffers a fatality at work, it is not necessarily the case that a police or HSE prosecution will result. Quickly alerting the MLP policy insurer can allow the associated legal team to present a case during the investigation stage, by providing evidence of risk management measures. It can also allow the company to handle the publicity around the incident efficiently and effectively, as well as working with crisis management experts.

Other aspects covered by such a policy might relate to data. One case involved a company providing what was alleged to be a defective response to a subject access request. Anyone has the right to make such a request, to assess what personal information is being held on file about them, and these requests are increasingly being used as a fishing exercise, to obtain data for other cases.

It is easy to mishandle them, but the consequences can be serious. In the actual case that arose, the business utilised the legal services provided by its MLP policy for the trial preparation, and thanks to the policy legal team's involvement, the case was withdrawn.

With 96 regulators and a vast amount of employment law to navigate, it makes sense to buy a policy that provides legal expertise and access to other professionals who can assist with crisis situations. To get this valuable cover in place, speak to your broker today.

¹ AXA Management Liability Policy & radar presentation

Model modular construction insurance with a broker's help

Modular construction ticks many boxes, being greener, less wasteful of resources, more cost-effective and up to 50% faster than traditional construction methods, and in the UK it is seen as a means of delivering the 'affordable homes' targets. Its popularity is such that the global modular construction market is set to grow from a \$104.1 billion value in 2024, to \$140.8 billion by 2029.¹

Evolutionary methods in any market, including construction, are also accompanied by new risks. In modular construction, the first is rooted in transportation, and if a building, commercial or domestic is pre-fabricated and built off-site, it must be transported to its final location, by land, sea or air.

By that stage, the structure's overall value is significant. It is the archetypal 'precious cargo', needing to be conveyed by appropriately robust heavy-lift vessels or barges. The risk of damaging the pre-fabricated structure, through mishandling or a transportation incident, means an

insurer may wish to see specialist loading or discharge surveys, before offering cover.²

The huge value must be fully covered by the cargo insurance policy limit. Discussion with a broker is also imperative, as delivery of a modular construction structure is intrinsically tied in with a construction contract that can penalise delays. Some transfer of business risk may be required, with the structuring of the insurance proposition.

Balancing risk, through the inclusion of excesses and deductibles within the policy wording, is often essential, and this is where a broker's expertise can assist.

The other consideration is fire. A pre-fabrication company takes on a major fire risk when bringing a variety of tradespeople under its roof, particularly for tasks such as welding, soldering, torching, grinding and operating open flame equipment, which can create sparks. Assessing a fire's overall potential impact is crucial, but so are preventative anti-combustion measures and fire practice compliance.

A robust fire safety plan is a key part of risk management strategy in such an environment. This should cover everything from the number of fire marshals and deputies required, to fire warning systems,

screening-off of welding, cutting and grinding areas, the marking of clear exit routes and overnight security, if required. An arson fire risk management plan should also be in place.

Ensuring fire watch systems are compliant with fire risk health and safety advice, and conducted without fail, following hot work on modular buildings, is imperative. Some insurance policies may impose strict hot work conditions which need to be complied with.

Modular construction companies should abide by the Fire Prevention Association's Joint Code of Practice for Fire Prevention on Construction Sites, covering activities with an original contract value of £2.5m or above, or smaller contracts contributing to a larger project to the value of £20m or more.³

An insurer may insist on this fire Code of Practice compliance, even if contract value limits are lower than stipulated, should construction occur in a higher risk area. Code compliance may be essential, to ensure insurance cover is available and contractual terms not breached, through lack of insurance.

To construct your ideal modular construction insurance programme, please contact us today.

¹ <https://www.marketsandmarkets.com/PressReleases/modular-construction.asp>

² <https://www.wtco.com/en-gb/insights/2024/08/modular-construction-an-increased-awareness-needed-of-project-cargo-insurance>

³ <https://www.thefpa.co.uk/advice-and-guidance/free-documents?q=joint%20code%20of%20practice> (download 2, 23 January 2023)

Can you predict a riot?

Summer 2024 was tainted by widespread disorder across the UK, in the wake of the Southport attack. On 30 July, the country witnessed violence against people, property and police, as violent disorder and civil unrest sprung up on a multi-location basis.

Businesses of all types became direct or indirect victims. Some business owners experienced physical property damage, or threats to themselves and their employees. Others suffered business disruption, having to vacate offices or retail premises on police advice, or taking a decision not to risk employees travelling to work.

Reputational damage has also affected businesses who employed those swiftly brought to justice for their actions on the streets, or online inciting of violence.

For towns like Southport, business recovery is essential, particularly for those that had to close due to a police cordon. Empty amusement parks, cafés and seaside shops have also been witnessed, and this is what an insurance policy would deem 'loss of attraction' (lessening of footfall to a business), following the riots.

The random nature of the protests, often in places where civil unrest is not usually witnessed, highlighted the changing pattern of such events, as almost any business can be caught up in civil unrest and suffer consequential losses.

It all highlights the value of insurance. Physical damage to homes and businesses is covered as standard on a property insurance policy, in most cases¹, however some do contain riot or civil unrest exclusions. Non-physical losses need to be covered by a business interruption policy and the eligibility of a claim scenario would be dependent upon the policy wording.

Claims relating to denial of access to a property, for instance, can typically only be made if such an add-on cover has been purchased.

If no insurance cover exists, a claim can be made under the Riot Compensation Act 2016², within 43 days⁴ from the day on which the riot ends. This purely relates to property damage.



Whilst having comprehensive property insurance and business interruption cover is the best business continuity strategy, there is more to consider. The UK's terrorism threat is ever-present, complex and evolving. The introduction to Parliament of Martyr's Law, making it a requirement for many public venues to increase their terrorism planning and response mechanisms,⁴ highlights that a terror-related attack can occur almost anywhere, not just in city centres or at transport hubs.

Whilst nobody involved in July's riots has so far been charged with terrorism, the former head of counter-terrorism believes many actions verged on it.⁵ However, no one organisation owned or organised the riots, so claims will be paid on a riot and civil unrest basis. Should actions have been

regarded as acts of terror, remembering that some Neo-Nazi groups are classed as terrorists, an impacted business would have probably needed to have terrorism insurance, or non-damage terrorism cover included in their policy, to make a successful claim.

This cover can protect those with one property or business, or a portfolio of properties in different locations. Some property owners will find their mortgage lender insisting on terrorism cover, whilst others may voluntarily buy it for its business interruption, denial of access, or loss of attraction benefits.

Discuss all business continuity and recovery options with a broker, and you should have a clear view of your cover choices. After all, you cannot predict a riot.

¹ <https://www.abi.org.uk/products-and-issues/topics-and-issues/civil-unrest-insurance-faqs-2024/>

² <https://www.gov.uk/government/publications/riot-compensation-guidance-leaflet/riot-compensation-claims-quick-guide-for-claimants>

³ https://northumbria-pcc.gov.uk/v3/wp-content/uploads/2024/08/Riot_Compensation_Public_Facing_Guidance_-_Final.pdf (page 5)

⁴ <https://homeofficemedia.blog.gov.uk/2024/09/13/martyns-law-factsheet/>

⁵ <https://www.bbc.co.uk/news/articles/c74lwnxxxzjo>

Enhanced worker protection requires specific risk approaches

New legislation, in the form of the Worker Protection (Amendment of Equality Act 2010) Act 2023, introduced on 26 October 2023¹, brings greater protection to those suffering workplace sexual harassment. Consequently, there is more for employers to do, in this area of risk management.

This stricter legislation comes at a time when allegations of sexual harassment are making significant headlines, in various high profile corporate cases. General awareness and consciousness of what constitutes inappropriate conduct is currently heightened, increasing an employer's risk.

Whilst the 2010 Equality Act prohibited sexual harassment and situations where an employee could be treated less favourably, after rejecting or submitting to conduct of a sexual nature, the law now expects more. Simply having an anti-harassment policy and evidence of training may not be sufficient, should an employee bring a case. However, a record of all training of this kind should still be maintained, and kept as it may help an employer defend a potential claim or allegation in the future.

The new law imposes a mandatory duty on employers to take 'reasonable steps' to protect employees. What is deemed 'reasonable steps' is open to judicial interpretation and influenced by arguments presented by claimant lawyers. It is essential that employers increase efforts to stamp out sexual harassment.

What is sexual harassment?

Harassment, in law, covers unwanted conduct relating to a protected characteristic, which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Sexual harassment is unwanted conduct of a sexual nature, which has this effect.² 58% of women have experienced some form of this at work, according to the Trade Union Congress.³



If the employer is held liable for the sexual harassment, a tribunal can now levy an increase of up to 25% in the compensation award. It is probable that higher-end increases will be imposed in instances where an employer cannot demonstrate a proactive approach to this issue.

Furthermore, the Equality and Human Rights Commission (EHRC) has been further empowered, as it can now investigate non-compliant employers, issue unlawful act notices and potentially use court orders to enforce compliance.⁴

¹ <https://www.legislation.gov.uk/ukpga/2023/51/contents>

² <https://www.cipd.org/uk/views-and-insights/thought-leadership/cipd-voice/new-duty-to-prevent-sexual-harassment/#::-:text=From%20October%202024%20the%20Worker.steps%20to%20prevent%20sexual%20harassment>

³ [https://www.tuc.org.uk/news/new-tuc-poll-2-3-young-women-have-experienced-sexual-harassment-bullying-or-verbal-abuse-work#:::-:text=Three%20in%20five%20\(58%25\),poll%20published%20today%20\(Friday\)](https://www.tuc.org.uk/news/new-tuc-poll-2-3-young-women-have-experienced-sexual-harassment-bullying-or-verbal-abuse-work#:::-:text=Three%20in%20five%20(58%25),poll%20published%20today%20(Friday))

⁴ <https://www.wiggin.co.uk/insight/from-reaction-to-prevention-the-new-duty-on-uk-employers-to-stop-sexual-harassment/>

Sexual harassment of employees by third parties

Whilst the legislation's original intention was to make employers 'vicariously liable' (liable by virtue of being the employer with a duty of care), in instances where a third party, such as a client or member of the public, sexually harassed an employee, the current legislation, at face value, does not impose such liability.

Legal experts warn, however, that such a duty is included through the 'back door', with EHRC draft guidance notes suggesting 'reasonable steps' to prevent sexual harassment include preventing harassment by third parties. With a new EHRC technical guide and Employment Code planned to reflect preventative duty, employers need to consider wider sexual harassment.

Employers must be proactive and not reactive. Combatting sexual harassment should not be regarded as a tick-box exercise but a necessary part of business practice.

How to tackle sexual harassment

The starting point is a thorough risk assessment, to analyse how and where sexual harassment could arise in the workplace, and in the wider environment within which employees carry out work-related duties. The nature of work carried out, employee exposure to third parties and the gender split within certain functions and teams may all be relevant.

Systems should be introduced, through which the reporting of concerns or incidents can be done confidentially and without fear of retaliation, through a variety of channels.⁵

A means of delivering prompt, thorough, fair and independent investigations into complaints should be devised, and appropriate and proportionate sanctions agreed and applied, to punish wrongdoing. A corporate policy on sexual harassment should be published and included in the employee handbook. Regular reviews, ideally following an examination of company data with regard to reports of sexual harassment, their regularity and their outcomes, should be scheduled. Meanwhile, employers must not neglect instances of bullying and discrimination.

Setting the culture and creating the safety net

However, a written policy does not change a workplace culture. Senior leaders need to set the tone and outline and demonstrate the values and behaviours expected, ensuring workplace interactions take place against a backdrop of dignity, respect and inclusion.

Training is also required, to enable all employees to recognise and red flag sexual harassment situations, as well as understanding their role in preventing these.

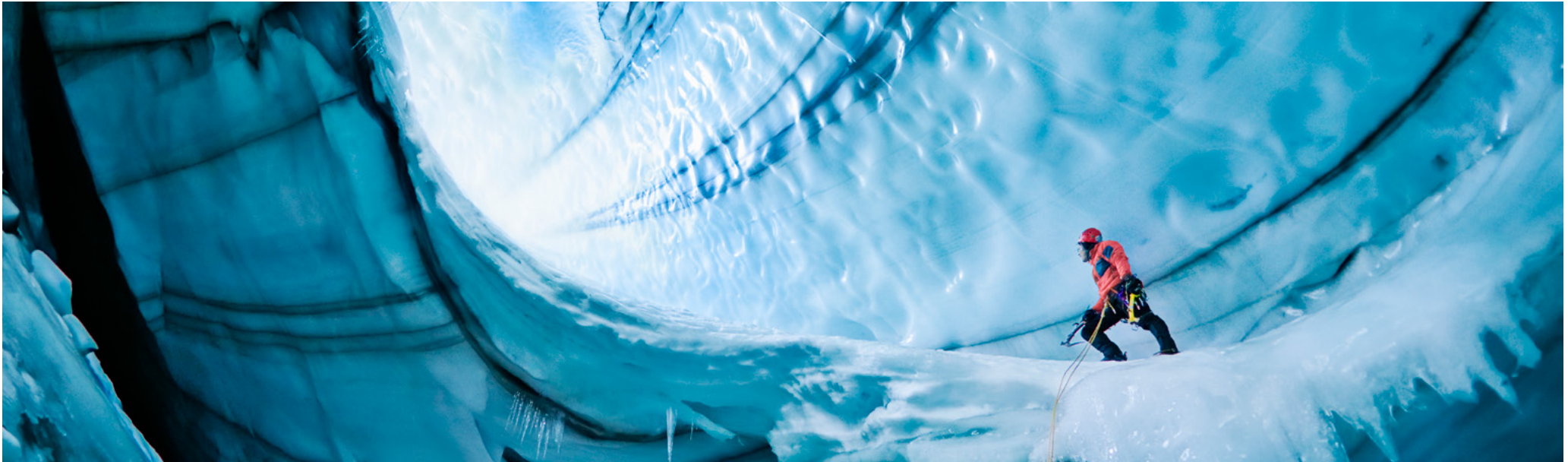
Line managers need the skills to challenge unfair treatment and inappropriate behaviours, as introducing staff surveys, to collate feedback, should be a priority.

Preventing issues, in a robust and meaningful way, is much better than a cure. However, employers should also remember that even unfounded allegations can result in costly legal defences. To protect against these, a risk management safety net, constructed from relevant insurance policies, is needed. The policies can then assist, should a case be brought against the company or a director.

To discuss such covers, please get in touch.



⁵ AXA Group presentation by Carlene Clifford, 18 June 2024.



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