Executive Liability Insurance for ESOPs

The Impact of COVID-19 on ESOP Executive Liability Insurance

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As we continue to work through the current pandemic, ESOP companies considering purchasing or renewing Executive Liability Insurance (D&O, Fiduciary, EPL, and Crime) should know that the insurance marketplace is taking measures on new applications as well as upcoming renewals.

ESOP companies in industries most adversely effected by COVID-19 and who are purchasing this insurance for the first time can expect to find it more difficult to obtain coverage than in the past. These first-time purchasers may face insurer declinations or limited insurer capacity. This is due to questioning of the timing of obtaining coverage – has first time Employment Practice Liability been requested as a reaction to expected lay-offs. For example, in this instance, the exposure is inherent. The same restrictions on first time coverage may not apply for a newly formed ESOP, particularly if coverage was in place prior to the transaction / change of control.

ESOP companies renewing their policies in the coming months should expect premium increases, increases in retentions, and perhaps reductions in their policy limits. Companies that are at-risk of disruption due to the pandemic, and are renewing their policies with an insurer that has longevity in writing Executive Liability for ESOP Companies, should feel reassured that the insurer will do its utmost to renew coverage. However, a number of insurer's have decided to no longer extend Executive Liability coverage to ESOPs, so in this instance, a replacement policy will need to be sought in line with the limits of liability currently purchased.

In fact, regardless of the industry group you are in, expect to answer more questions on how your company is coping with the pandemic and how it is affecting your ESOP company operationally and financially. There may be specific COVID-19 questionnaires that will be requested as well as having to provide more current financial information.

Typical questions will revolve around whether the ESOP company is in compliance with their debt covenants (if any), cash position, actions being taken to preserve capital, and meeting short-term obligations, mitigating cost reductions for the short term, curtailment of revenue or operations, and anticipated layoffs or furloughs.

As a reminder, the more thorough the submission to the insurer to request insurance terms, the better the response. Below is a minimum of what a typical insurance submission to your broker or insurer should look like:

- Signed and dated application with supplemental information in response to “yes” answers to questions including information about past and future layoffs
- Completed ESOP underwriting questionnaire
- Copy of the most recent annual financial report
- Copy of the most recent share valuation; if necessary, have the insurer provide a signed non-disclosure statement so it may be released by the trustee
- Updates to HR employee handbook
- Updates to plan document

Other thoughts include:

- Answer as completely as possible questions from the insurance company on how the pandemic has effected them. You may want to consider forming your own questionnaire with responses.
- Provide any pro-forma financial information projecting your financials during the next six to twelve months.
- Be open to a conference call with the insurance company underwriter to address any concerns they may express.
- Once a proposal is provided, make sure it includes a copy of the policy form and endorsements. Have the insurance broker or agent explain the intent of each endorsement. Review policy definitions as well.

The current insurance marketplace is the most unpredictable we have ever seen. A lot depends on how long the current health crisis lasts and how the re-opening unfolds and economy gets going again. Currently COVID-19 related claims against the D&O, Fiduciary and EPL policies are somewhat sparse, but it is likely we will see an increase as the economy and ESOP companies start to reopen. The way that this is done will be critical to reduce the likelihood of D&O, EPL and other claims, such as workers' compensation. As companies navigate the reopening process, there is also the potential for mismanagement of claims, as well as claims against boards for alleged breaches of the duty of care or breach of the duty of oversight. We have already seen in certain states that a company opening up in violation of state or local government orders could jeopardize their corporate insurance coverage that would otherwise be available to pay claims on the basis of non-compliance of the business closure orders.

If you have questions, contact:

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Murray, an ESOP Company, administers an affinity insurance program endorsed by The ESOP Association since 1989. The Program offers D&O, Fiduciary, EPL and Cyber Liability insurances to ESOP companies.