

Why D&O Insurance Isn't Just For Public Companies

If you're an owner, board member or executive of a private company without directors and officers liability insurance, you may be putting yourself at risk against lawsuits by regulators, customers, vendors, competitors or partners. The reality is the frequency of these claims has increased in recent years as a result of the recession and recovering economy, our litigious age and the fact that plaintiffs in directors and officers claims now include a broader array of claimants than just shareholders.

Directors and officers liability insurance, commonly referred to as D&O insurance, has a broad definition of claim and covers the defense costs, settlements and judgments associated with claims. D&O policies help provide protection for the assets of the company and the personal assets of its directors and officers.

Oftentimes, leaders of private companies are skeptical that they need this type of insurance, looking at the ownership structure and concluding that their company would never have a D&O claim. Based on my experience, this is false; private companies are vulnerable to these types of lawsuits as well.

According to the Chubb Private Company Risk Survey, 44 percent of private companies experienced at least one loss event related to D&O liability, employment practices liability, fiduciary liability, employee fraud, workplace violence or cyber liability



in 2013. That makes D&O lawsuits almost as common for private companies as for public ones. While the survey indicated that the likelihood of a claim was greater for larger companies, 33 percent of companies with only 25-49 employees experienced a loss event as well.

Listed below are my top 5 reasons for adding D&O coverage in the private sector:

- 1. Directors and officers can be held personally liable for claims.** This can include the personal assets of a director or officer's spouse, domestic partner or the deceased director or officer's estate.
- 2. In recent years, the number of employment practices and claims filed against private company directors and officers has doubled according to the Equal Employment Opportunity Commission,** which reported nearly 100,000 individual charge filings in one year alone.
- 3. Recent developments, including heightened regulatory enforcement activities, the growth of social media and the passage of the JOBS Act are creating**

additional exposures for private companies directors and officers.

4. Many private companies are established with the hope that someday the business can go public. If and when that event does happen, D&O can protect the founding entrepreneurs against claims by shareholders/investors that the sales price was not adequate.

5. Directors and officers of private companies often have a great deal of their own wealth tied up in the firm. Therefore, the cost of defending, settling, or being held liable on a claim can have financial repercussions for that executive's spouse, family and estate.

In our current day, board members and senior managers of all types of companies find themselves entangled in litigation or battling regulatory enforcement actions. The types of exposures that face private company directors and officers include:

■ **Shareholder lawsuits:** While private companies are not subject to the same sorts of federal class action suits that hit public companies, shareholder suits are the second largest category of lawsuits brought against private company directors and officers

■ **Creditor and bankruptcy trustee actions:** For private companies facing financial difficulty, creditors have successfully sued directors of failed companies for breach of fiduciary duty

■ **Employment claims:** Claims of wrongdoings, negligence or mismanagement by employees or claims of sexual harassment, discrimination or wrongful termination

■ **Competitor suits:** Anti-trust or unfair competition suits include misrepresentation of a competitor's products, infringement of a trade dress and breach of contracts with a competitor

■ **Customer lawsuits:** The types of lawsuits brought by customers include those stemming from contractual disputes, debt collection, refusal to extend credit and discrimination

■ **Governmental Claims:** Claims by governmental agencies related to tax and labor laws

Whether or not a company should purchase D&O insurance is an important decision for all company executives. Regardless of your decision, it's important to consider all of your risks and exposures. The reality is that D&O claims are expensive and while they may not happen frequently in the life of a company – they can be devastating when they occur if you find yourself unprotected.

To learn more about D&O insurance or to evaluate your risks, contact Overmyer Hall Associates at oh-ins.com.