

Duty to make a fair presentation of the risk

Basic rules to avoid problems with claims

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Duty of disclosure

Please read this document carefully as any failure to comply with the duty to make a fair presentation of the risk may entitle the insurer to avoid the insurance contract or to seek some other remedy. If you have any questions, please do not hesitate to contact your account executive in the first instance. Please note that this memorandum does not purport to constitute legal advice. If appropriate you should, in addition to speaking with your account executive, consider taking your own independent legal advice on this subject.

Duty of Fair Presentation

The Insurance Act 2015 imposes an obligation on all policyholders to 'make a fair presentation of the risk' prior to the policy commencing. A fair presentation is one that discloses, in a manner that is reasonably clear and accessible, every material circumstance which is known or ought to be known by the policyholder's senior management, or those responsible for arranging insurance, following a reasonable search.

The key elements of this obligation are explained below:

Material circumstance – this is anything which would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms. There is no specific limitation on what constitutes a material circumstance, but it would typically include any factors pertaining to the risk to be insured including prior claims, your financial history, convictions of key personnel and your business activities. You are not obliged to disclose something that reduces the risk to be insured.

Known or ought to be known – you are obliged to disclose material circumstances that you actually know but also those that you ought to know. This means that if the information is readily available to you but you fail to disclose it owing to either a lack of enquiry or by 'turning a blind eye', you will have breached your duty to fairly present the risk. Equally, any relevant knowledge we have as your broker must also be presented to insurers. We must therefore make you aware that all information you provide to us must form part of the presentation of the risk, if relevant. This includes any information you provide to us in a social or informal setting.

Senior management – your knowledge, for the purposes of the Act, includes (but is not limited to) that of all senior management. Senior management includes anyone who has a key role in making decisions on behalf of the business, even if they do not sit on the board or if they do not officially have a management role. If you are a sole trader you will be treated as knowing both what you know and what is known to the individuals responsible for arranging your insurance.

Reasonable search – you are obliged to undertake a reasonable search. What is reasonable will depend upon the nature of your business and the policy you are purchasing. We will provide you with advice as to what might be reasonable. When considering the extent of your search, you should take into account the nature of the insurance you wish to purchase and who within your organisation is best placed to provide relevant information.

Reasonably clear and accessible – all information must be provided to insurers in a reasonably clear and accessible manner. This means that information must not be provided in an ambiguous way. The new rules also prevent policyholders from concealing key facts amongst large volumes of less relevant or immaterial information.

What does this mean in practice?

The amount of information to be provided will depend upon the nature of the risk and the insurance you are purchasing.

We will guide you through that process, although you should take the time to carefully identify who within your business is best placed to identify any information that may be relevant to insurers when considering the particular risk and type of policy. You must consult with anyone who has particular knowledge about the risk to be insured. This will include your employees such as risk managers or the employees who are involved in negotiating the insurance.

Presentation of information

It is your responsibility to make sure that the information to be submitted to the insurer is presented in a way that the insurer will find reasonably clear and accessible. Where a large amount of information is provided you will need to ensure that it is organised in a structured way with appropriate indexing and signposting to enable the insurer to navigate to what is important.

All statements and facts disclosed on proposal forms, statement of facts, claim forms and other documents should be

full, true and accurate and must be given after undertaking a reasonable search, including consulting with your senior management.

When to disclose

You are required to disclose the relevant information to insurers during the negotiations preceding the conclusion of the original contract of insurance and all subsequent renewals of that contract. During the period of the policy you are also required to disclose relevant information when:

- you want to vary terms of the original insurance contract so the insurer takes on additional risk;
- if there is an increase or alteration in risk;
- an extension to the policy period.

What happens if you do not fairly present the risk?

If you fail to comply with your obligations, insurers have differing remedies depending upon the nature of the breach and what would have happened had you fairly presented the risk.

If you deliberately or recklessly (i.e. without care) fail to present the risk fairly, insurers may avoid the policy. This means they can retain all premiums and treat the policy as if it never existed and refuse to make any claims payments. You could also be obliged to repay any claims payments that had already been made.

If you fail to present the risk fairly, but your failure was neither deliberate nor reckless, insurer's response will depend upon what would have happened if you had complied with your obligations:

- a) if insurers would not have provided the policy, they may treat the policy as if it never existed, refuse to make any claims payments and demand the return of any claims payments already made. However, insurers would have to return any premium payments already made;
- b) if insurers would have provided the policy but on different terms, the policy will remain in force but will be treated as if those different terms applied from the start of the policy. This could

result in a claim not being met in part or in full (e.g. if insurers would have excluded that particular activity or imposed additional conditions which you did not comply with);

- c) if insurers would have provided the policy but charged a higher premium, insurers may reduce any payment in proportion to the difference between the premium charged and the premium that would have been charged if you had fairly presented the risk. This could result in a significant reduction to the amount of any payment under the policy. By way of example, if a fair presentation would have resulted in the premium doubling, any claims payment under the policy would be halved. This remedy applies regardless of whether there is any connection between the shortcoming in the presentation of the risk and the subject matter of the claim.

Examples of material information:

- business activity (or change to business activity) including processes, products and geographic presence;
- new companies, markets, acquisitions, disposals;
- new processes such as a new machine or new method;
- additional premises / insurable items;
- change to premises;
- unoccupancy of premises;
- letting part of your premises to a third party;
- business financial status;
- loss history / experience including potential claims circumstances / incidents. This could apply to uninsured as well as insured matters;
- criminal conviction / regulatory investigation or enforcement / Health and Safety investigation or prosecution;
- insurer previous declinature, refusal to renew, imposed terms / restrictions in cover, mid term cancellations.

THIS LIST PROVIDES EXAMPLES ONLY; IF IN DOUBT – DISCLOSE.

The information contained herein is based on sources we believe reliable and should be understood to be general risk management and insurance information only. The information is not intended to be taken as advice with respect to any individual situation and cannot be relied upon as such.

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