



Tipsheet 5 Employer's Liability – Indemnity vs Insuring Clause

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Coverage for claims involving contractual indemnities under Employer's Liability Policies and the limitations of available policies.

No cover for contractual liabilities

Some liability insurance policies, particularly Employer's Liability Insurance, do not cover claims arising from contractual indemnities given by the insured. Usually this is due to the limitations of the insuring clause in the policy.

When contracting with other parties, employers often give an indemnity or 'hold harmless' for injuries involving their own employees. They generally expect their Employer's Liability Insurance to indemnify them for all types of compensation claims involving an injured employee (other than workers compensation).

Example: An employee of a crane hire business is injured while working on a building contractor's site due to the negligence of his employer or the building contractor. The employee can claim workers compensation and can also make a common law negligence claim against both his employer and the building contractor.

What are the limitations?

Some Employer's Liability Insurance only covers the employer for:

- Personal injury/compensation claims brought by their employees; or
- Claims for contribution brought by a third party - but only for the employer's common law liability to compensate the injured employee (eg the employer's share of legal responsibility for the accident as determined by the courts).

Unless the indemnity clause in a contract is 'aligned' with the cover provided by the policy, the policy may not cover a claim brought by a third party against the employer under the contractual indemnity clause.

Principal's liability to an injured worker is not always covered by employer's liability insurance.ⁱ

Contractors are not covered by employer's liability insuranceⁱⁱ nor are a contractor's employees. Contractors should maintain their own public liability and workers compensation/ Employer's Liability Insurance to cover property damage and personal injury claims.

Example: A crane hire business hires a crane and an operator to a building contractor. The hire contract contains the following indemnity clause:

"The (crane hire business) will indemnify the (building contractor) for any loss, liability, suits, actions, damages or expenses incurred by the contractor and arising from personal injury or property damage suffered by any person, including an employee, while the (crane hire business) and its employees are present on the (building contractor's) site".

If the policy only covers compensation claims brought by the crane hire business' employees, it wouldn't cover any claims made by the building contractor against the crane hire business. This means that the crane hire business will be 'uninsured' for its contractual liability to the building contractor.

Disclaimer

This Tipsheet contains general information about contractual liability issues. It is not tailored to your individual circumstances and is not a substitute for obtaining specific insurance and legal advice about the contractual liability issues that arise in your business.

Examples of insuring clauses

The words of the insuring clause can make a big difference to whether a policy will cover a contractual indemnity claim.

It is important to read the insuring clauses and exclusions together to fully understand the extent of the cover provided. Where Employer's Liability Insurance is provided with a workers' compensation policy, the insurance benefit for common law liability is usually limited to employees. The insuring clause for Employer's Liability Insurance or common law liability in a workers' compensation policy can differ from state to state and from insurer to insurer.ⁱⁱⁱ

Example: Consider three policies with different "insuring clauses":

- *Policy A states: "The Insurer will indemnify the Employer's liability against any amount that the Employer becomes liable to pay independently of the Workers Compensation Act for any injury to an employee during or in respect of the period of insurance".^{iv}*
- *Policy B states: "The Insurer will indemnify the Employer against all sums for which, in respect of injury to any worker employed by him, the Employer may become legally liable by way of damages arising under circumstances creating also, independently of this Workers Compensation Act, a legal liability of the Employer to pay damages in respect of that injury".^v*
- *Policy C states: "The Insurer will indemnify the Employer's common law liability for injury suffered by a worker".^{vi}*

Policy C will never respond to an insured's contractual liability to a third party - it is limited to claims for injury brought by the worker.

Policies A and B are more likely to respond where the employer is liable to third parties who also compensate the injured worker (eg the building contractor in the previous example).

Importance of 'aligning' indemnities with insuring clauses

Even if a policy is broad enough to cover claims brought by third parties - the policy might be limited to the insured's common law liability (ie only their proportion of the claim) or it may exclude liability 'assumed' under a contract.

The risk of 'uninsured' losses increases for an employer if the indemnity clause in the contract is not consistent with proportionate liability legislation or 'contributory negligence' principles^{vii}.

Example: Policy B provides better cover for the crane hire business because it has assumed 100% of the liability for property damage or personal injury to employee under the contract.

This is because Policy B covers "all sums...the Employer may become legally liable by way of damages". This would include a damages claim brought by the contractor to enforce the contractual indemnity. As long as Policy B does not have a 'contractual liability' exclusion or the liability arising from the contract has been accepted by the insurer (where necessary), the policy should cover most of the liability to the employer to the employee and the contractor.

Policy A is not suitable because it will only meet the employer's proportion of the claim as determined under the Common Law (and a claim for contribution of that amount made by the building contractor or its insurers). It doesn't cover the contractor's liability arising from the indemnity clause in the contract.

If the crane hire business changed the indemnity clause in the contract to include 'proportionate liability' principles (ie the amount to be indemnified is calculated according to the extent to which the crane hire business was to blame for the damage or injury suffered by the worker), then the policy and the indemnity clause would be more closely 'aligned'.

Contact your broker if you would like a legal review of your contracts.

ⁱ There may be some insurance available under a public liability policy if the policy is extended to the principal's liability. Some workers compensation policies offer principal's indemnity as an

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extension. Ask your broker for more information or for a copy of our Tipsheet 7 for more details.

ⁱⁱ Insurance for common law liability can be limited to employees of the insured and not contractors (however if the insurance is provided as an extension to workers compensation it may extend to contractors). Workers compensation covers contractors if they come within the definition of a "worker" in the relevant Workers Compensation Act. If the same definitions are used for the common law liability extension then there can be cover for contractors.

ⁱⁱⁱ In some states, where common law liability is also covered under a workers' compensation policy, an employer may be covered for injuries suffered by contractors. Again this depends on the definition of "worker" in the Act and whether the same definition is used in the insurance policy.

^{iv} *Multiplex Constructions Pty Ltd v. Irving; Fugen Holdings Pty Ltd* [2004] NSWCA 346.

^v *State Government Insurance Office (Qld) v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR 228.

^{vi} *Nigel Watts v. Fashion Agencies Pty Ltd v. GIO General Ltd* (1995) ANZ Insurance Cases 61-235.

^{vii} See our Tipsheet 3 for more information about proportionate liability. Ask your broker for a copy.

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