

Directors & Officers (D&O) Liability

What is D&O Insurance and What Does it Cover?

Directors & Officers (D&O) insurance protects a company's executive management team and a company's balance sheet of a public, private, and non-profit company from claims relating to their management decisions and business operations. Contrary to popular belief, all organizations have risks a D&O policy would respond to. For example, a private company D&O policy can cover claims relating to unfair business practices, conflict of interests, violations of non-compete agreements, a bankruptcy filing, creditor actions, and merger & acquisition related issues. Regulatory investigations and fines or penalties as a result of a regulatory action would be addressed.

The 3 basic parts to a D&O policy are:

- A – Provides protection for the Directors and Officers from personal liability
- B – Provides protection for company indemnification of Directors & Officers
- C – Provides protection for the corporate entity itself

Why Does a Cannabis Business Need D&O Insurance?

Directors and officers can be held personally liable for the actions and decisions made in the interest of the company or organization. Defending these decisions can be costly. The cost of defending a D&O claim can often exceed any financial means or resources available to a company. A D&O policy provides you with financial and legal resources to respond to legal actions against D's & O's and prevent a negative impact to a company's balance sheet for unexpected expenses related to a D&O claim. D&O insurance is not just for publicly traded companies to cover suits from shareholders. It's a valuable tool for all companies and is an important item to consider when attracting credible investors, lenders, vendors and board members.

Which D&O Terms and Conditions Should Be Specifically Reviewed with a Broker?

Due to the federal illegality of marijuana, there are certain policy provisions within a D&O cannabis policy to be aware of. We can help you design a strong policy for your client's cannabis related business by considering and negotiating the following conditions and exclusions:

Exclusions to Note

- Creditor and Debt Holder Exclusions
- Antitrust/Unfair Business Practices Exclusions
- Bodily Injury/Property Damage Exclusions
- Pollution Exclusions
- Regulatory Restrictions

Enhancements to Note

- Non-Rescindable Individuals Coverage
- Innocent Insureds for Fraudulent Acts
- Defense Allocation
- Additional side A (personal limits)
- Executive Knowledge Carvebacks

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Claim Scenarios

Misrepresentation

A newly public company's directors and officers failed to disclose material facts and provided inaccurate and misleading information to their investors. It was alleged the materials did not disclose the high turnover of management and the company's latest product was still under development. The company later went bankrupt. The complaint included causes of action for: (1) common law fraud; (2) negligent misrepresentation; and (3) breach of fiduciary duties. The claim settled for \$1 million and defense costs exceeded another \$1.4 million.

Credit Fraud

A creditor filed a complaint against an existing cannabis company's individual directors and officers of a company. The claim alleged its CEO, CFO, and COO conspired to use the plaintiff's services to furnish, install and repair the company's equipment knowing it was insolvent and was planning to file for bankruptcy protection. Causes of action included: (1) fraud, misrepresentation, and non-disclosure; (2) deceptive trade practices; and (3) civil conspiracy. Total settlement and defense of the individually named defendants exceeded \$400,000.

Stolen Corporate Secrets

The Vice President of a cannabis manufacturer determined diversification into a different product line presented tremendous sales potential for his company. Instead of presenting the opportunity to his employer, the VP shared it with his brother who formed a new company to produce that product. On behalf of the company, a shareholder sued the VP alleging he wrongfully took advantage of an opportunity belonging to the corporation. The suit eventually settled for \$2.5M.

Recruiting Sales Executives

A rapidly expanding cannabis company recruited a top sales executive who had an employment contract with a competitor company. The competitor sued the company for damages suffered because of losing its top sales producer on the grounds the company interfered with the competitor's contractual relationship with its employee. Defense expenses were in excess of \$250,000 and the competitor was awarded damages of \$600,000.

Investment Agreement

A financially struggling cannabis company signed onto an investment agreement with a third party which agreed not to negotiate with other entities regarding a potential acquisition for a two-week period. During that time, the company engaged with another investment group. The third party alleged the company performed a breach of investment agreement and intentional and negligent misrepresentation. The total amount of settlement and defense costs exceeded \$350,000.

**Let's talk about your insurance needs.
Contact a cannabis industry insurance expert today.**

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