

## Liability Focus

Provided by BHC Insurance

### 5 Common Triggers of D&O Claims for Private Companies

Many private company leaders assume directors and officers liability (D&O) insurance is a public company concern. In practice, any company with a board, investors, lenders or employees can face claims against its directors and officers. Most of these claims involve allegations of fiduciary duty breaches, and legal defense costs alone can be significant, even when claims are ultimately dismissed. Understanding the following five common triggers of these claims is a key step in managing this exposure.

#### 1. Investor and Minority Shareholder Disputes

Investors and minority shareholders can sue directors for misrepresenting the company's value, making improper distributions or diluting their ownership without adequate notice. These disputes come up most often in closely held companies, family businesses and venture-backed entities, typically during capital raises, ownership transitions or buyout negotiations. Early investors, departing co-founders and employees with equity stakes are all potential claimants. Directors are frequently named personally, even when the company itself is the primary target.

#### 2. Employment-related Claims Against Officers

Wrongful termination, discrimination, harassment and retaliation claims can name officers personally, particularly at companies without formal HR

processes. Private companies are especially vulnerable here because they often lack consistent documentation, defined complaint procedures and clear disciplinary records. While officers may be named individually, most traditional standalone D&O policies exclude employment practices claims. D&O Side A coverage may respond in limited circumstances, but these risks are typically addressed under a separate employment practices liability (EPL) policy. Many private company management liability packages bundle both, so it's worth confirming how your policy handles employment-related claims.

#### 3. Creditor and Lender Claims in Financial Distress

As a company approaches insolvency, creditors may gain standing to pursue claims related to directors' decisions, not just shareholders. Decisions made during this period, including preferential payments to some creditors over others, asset transfers or continuing to operate when it only deepens losses, can expose directors personally. Lenders may also pursue officers directly if they believe financial statements or loan applications contained misrepresentations. D&O policies differ significantly in how they handle insolvency-related claims, so policy language deserves a close look before any action is taken.

#### 4. M&A and Transaction-related Claims

Buyers, sellers and minority holders can all bring claims against directors over how a deal was handled. Typical allegations involve failure to get fair value, undisclosed conflicts of interest or pushing

through a transaction that favored insiders. Representations and warranties insurance addresses breaches of transaction representations and warranties, but it does not cover the full range of fiduciary duty or management liability allegations that may be asserted against directors and officers. D&O policies often include provisions specific to merger-and-acquisition (M&A) activity, and runoff (or tail) coverage is typically required once a change-of-control transaction closes.

## 5. Regulatory Investigations and Compliance Failures

Private companies can be investigated by state or federal regulators over data privacy, environmental compliance, workplace safety, consumer protection and industry-specific rules. Directors and officers named in those investigations face real defense costs even before anything is formally charged. Data privacy is an active area, with a growing number of states now having comprehensive privacy laws in effect, creating a patchwork of compliance obligations. Even where federal enforcement priorities shift, state regulators and plaintiff attorneys continue to target individual executives for misrepresentation or inadequate oversight.

## Reducing D&O Exposure

No risk management program removes D&O exposure entirely, but several practices can reduce the likelihood and cost of claims:

- Keep clear governance records, including board minutes that show how major decisions were made and why.
- Apply HR policies consistently and document complaints, investigations and outcomes.
- Bring in legal counsel early when financial trouble appears; document board discussions about options and alternatives.
- Use independent board review and fairness opinions for significant transactions, and confirm tail coverage is in place before any deal closes.

- Run periodic compliance reviews and make sure the board's oversight of regulatory obligations is documented.
- Review your D&O policy structure carefully, paying attention to exclusions and how the policy responds to investigations versus formal enforcement actions, to confirm coverage is available when a claim arises.

## Conclusion

Private company D&O exposure is real and comes from many directions. Investor disputes, employment claims, financial distress, transactions and regulatory investigations can all put directors and officers at personal risk. Strong governance practices, consistent documentation and the right coverage structure go a long way.

Contact us today for more information.