



An employer's guide to Employers' Liability Insurance

This briefing provides an overview of Employers' Liability Insurance ("ELI") for businesses.

Key points

- Employers (with very limited exceptions) are under a **statutory obligation to maintain ELI**.
- ELI is designed to **ensure the availability of funds** (from the insurer or, if the insurer is insolvent, the Financial Services Compensation Scheme) **to compensate an employee who suffers bodily injury or a disease "arising out of and in the course of their employment"** whether or not the disease manifests itself after the employment.
- ELI is distinct from public liability insurance and specific health and safety legislation.
- An employer commits a **criminal offence** punishable by a fine if it:
 - **fails to have the necessary insurance** in place on any day; or
 - **fails to display a copy of the ELI insurance certificate** at each place of business at which he employs any relevant employee.
- The **statutory obligation to insure applies equally to companies who only employ directors** (who may also be shareholders) and no other "employees" (although see the sole trader exception below).

Is ELI compulsory?

Yes, ELI is compulsory. Unlike public liability insurance (which is optional) employers' liability insurance is one of two types of compulsory insurance in Great Britain, the other being motor insurance. An employer with business activities in Great Britain

(including offshore installations) is under a statutory obligation to maintain insurance against the employer's *"liability for bodily injury or disease sustained by his employees, and arising out of and in the course of their employment in Great Britain in that business."* (s.1(1) of the Employers' Liability (Compulsory Insurance) Act 1969 (the "**Act**").

An employer commits a criminal offence and will be liable for a fine if, on any day, it does not have the necessary insurance in accordance with the Act (s. 5 of the Act).

Who is under a statutory obligation to maintain ELI?

The obligation to insure applies to: *"every employer carrying on any business in Great Britain"*. The definition of *"carrying on a business"* is broad and "includes a trade or profession, and includes any activity carried on by a body of persons, whether corporate or unincorporate" (s.1(3)(c) of the Act). There are two exclusions worth noting (although other exclusions exist in relation to employee compulsory motor insurance schemes and mutual assurance schemes):

- **Public/local authority exception** - Certain public authorities and government bodies are exempted from the statutory obligation to maintain employers' liability insurance.
- **Sole trader exception** - Where a sole trader incorporates and employs one person who owns at least 50% of the share capital, the statutory obligation to insure does not apply.

Who constitutes an "employee" for the purposes of ELI?

The definition of "employees" is broadly defined and includes a contract for *"manual labour, clerical work or otherwise, whether such contract is expressed or implied, oral or in writing."*

Casual/part-time workers - Casual or part time workers will trigger the obligation on the employer to insure. It does not matter whether the contract is oral, implied or in writing.

Workers paid by a third party - Complications arise where an employee is employed and paid by Employer A and is temporarily employed (although not paid) by Employer B. The general test is not who the employee usually works for or who the employee is paid by but “who has at the moment the right to control the manner of execution of the acts of the [employee]”¹. In these circumstances, if the policy only covers those employees who have a contract of employment, this may result in the employee temporarily employed by Employer B having a legitimate claim against Employer B, without Employer B having the benefit of insurance.

Family business exemption - Where the employer is a direct family relation of the employee, the employer may not need to obtain ELI in relation to that employee.

Employees not resident in Great Britain - The Act itself does not apply to those individuals who are “not ordinarily resident in Great Britain”. However, the Employers’ Liability (Compulsory Insurance) Regulations 1998 (the “Regs”) amended the obligation to insure under the Act so that it is now triggered for an employee who is: not ordinarily resident in Great Britain but has either: i) spent 14 days continuously in Great Britain; or ii) spent more than seven days on an offshore installation.

Employees based abroad are subject to the employment jurisdiction in which they work. There may be compulsory insurance requirements in that country. Local legal advice should be sought.

Insurance Policies in Practice - The policy wording should always be consulted. The ABI issued guidance to businesses in 2013 stating that a standard ELI policy should (notwithstanding the exceptions above) cover non-usual employees such as, persons hired or borrowed from another employer (e.g. drivers or operators of hired plant), work experience students and homeworkers.

What is the scope and extent of employers’ liability insurance?

Does the obligation to insure apply where the company has directors but no “employees”? Yes. There is a common misconception that the obligation to insure does not apply where the only employees of the company are the directors of the company (who are often the shareholders). This is incorrect. The only related exception to the obligation is the “incorporated sole trader exception” (see above).

Are there any limits to policy terms? Yes. The Regs specify certain criteria for ELI policies. For example, an approved policy must not contain provisions which limit the coverage by reference to the employer’s failure to exercise reasonable care, failure to adhere to health and safety regulations or the keeping of specified records by the employer. However, an insurer can maintain in the policy the right to recover any payment to an employee from the employer for such failures (assuming the employer can pay). In addition, employers cannot charge the employee for the maintenance of the insurance.

What is covered by employers’ liability insurance? ELI relates to the liability of the employer for bodily injury or disease occasioned to the employee. It does not cover damage to the employee’s property.

Does there have to be a causal link between employment and the injury/disease? Yes - the injury/disease must be “sustained by his employees, and arising out of or in the course of his employment”. Accordingly, an employee injured as a passenger in the car that the employer had provided to take him to work was not injured in the course of his employment because the employment contract said nothing about the employee being obliged to travel to work in the vehicle provided².

When does the injury/disease have to occur? The generally accepted trigger for ELI is bodily injury or disease caused during the employment even if the disease manifested itself at a later date³. This has caused particular problems for employers when it comes to ‘long tail’ diseases such as mesothelioma where injuries by exposure may technically have happened many years before the disease manifests itself in diagnosable symptoms. Whilst the courts have seen extensive litigation attempting to define the timing of relevant ‘triggers’ in such cases, the practical consequences are that employers often struggle to trace relevant historical insurers (assuming they are still solvent). Conventionally, tracing historic insurers has depended on the record-keeping practice of the individual insurer or the fortunes of an insurance investigator or ABI trace search. Going forward, the FCA has required that data on new or renewed ELI policies from 1 April 2012 onwards is maintained by insurers and the vast majority are registered on the EL Database maintained by the industry-established Employers’ Liability Tracing Office (ELTO). To the extent that EL data has been maintained prior to 1 April 2012 (whether with ELTO or otherwise), that has been and remains largely voluntary.

¹ See *Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd [1947] A.C. 1*

² *Vandyke v Fender [1970] 2 Q.B. 292*

³ *Durham v BAI (Run Off) Ltd 2012 UKSC 14*

Do employers have any other specific duties in relation to ELI?

Yes, employers have other duties in relation to ELI. The insurer must issue the employer with a certificate evidencing the insurance not less than thirty days after the commencement date. The employer must *"display one or more copies of it*

at each place of business at which he employs any relevant employee of the class or description to which such certificates relate". Failure to do so is an offence.

This may seem onerous, however, the certificate can be made available in electronic form if each employee to whom it relates has reasonable access to it in that form.

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