



# HERA INDEMNITY

## THE DUTY OF DISCLOSURE AND FAIR PRESENTATION

If your insurance<sup>1</sup> policy is governed by the laws of England and Wales, Scotland or Northern Ireland<sup>2</sup> please read this guidance note carefully, as any failure to disclose material information to your insurer may adversely affect the validity of your insurance policy. If you have any questions, please do not hesitate to contact us in the first instance.

If your insurance policy is not governed by the laws of England and Wales, Scotland or Northern Ireland we recommend that you obtain independent advice as to your obligations under the relevant law. If you are not sure about which law applies to your insurance policy, you should discuss this with us.

This guidance note does not purport to constitute legal advice but it does reflect the law. Your insurance policy may contain clauses which vary the strict legal position. If appropriate you should, in addition to speaking with us, consider taking your own independent legal advice.

Please tell us if the person in your organisation responsible for arranging insurance changes so that we may explain the duty of disclosure/fair presentation to that person.

**REMEMBER – you are responsible for the accuracy and completeness of all the information you provide to us and to your insurer.**

### 1. BUSINESS INSURANCE CONTRACTS<sup>3</sup>

#### 1.1 YOUR OBLIGATIONS

If you are a business and your insurance policy is governed by English law, you must, at all times, act with utmost good faith towards your insurer. This means that before your policy is placed, at renewal, when varying or extending the policy (and also during the policy period if your policy contains a particular clause stating that any change in the circumstances must be advised to your insurer), you must disclose to your insurer all information, facts, and circumstances which are, or ought to be, known to you and which are material to the risk. When providing information or completing a proposal form or otherwise confirming any information to your insurer, you should take care to ensure that the details provided are complete and accurate.

Even where a proposal form is used, you should note that your duty of disclosure is not confined to answering the specific questions listed in the form and/or asked by us or your insurer and that all material circumstances should be disclosed to your insurer, regardless of whether or not your insurer has asked for the information.

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<sup>1</sup> References to insurance/insured/insurer also apply to reinsurance/reinsured/reinsurer, save for consumer insurance references.

<sup>2</sup> All references to English law include the laws of Wales, Scotland, and Northern Ireland.

<sup>3</sup> A business insurance contract is any contract which is not a consumer contract. A consumer contract is an insurance contract taken out by an individual for purposes which are wholly or mainly unrelated to the individual's trade, business, or profession.



## IF YOUR POLICY IS PLACED, RENEWED, OR VARIED ON OR AFTER 12 AUGUST 2016

For policies placed, renewed, or varied on or after 12 August 2016 the new Insurance Act 2015 will apply. This means you will have a duty to make a “**fair presentation**” of the risk and you must disclose to your insurer every material circumstance which you know or ought to know. The Insurance Act gives some guidance as to what this means:

- You must disclose every material circumstance which is known by (i) your senior management (the Act defines “senior management” as “those individuals who play significant roles in the making of decisions about how the insured’s activities are to be managed or organised”); **and** (ii) those individuals responsible for arranging your insurance (which includes risk managers and any employee who assists in the collection of data, or who negotiates the terms of the insurance, such as your individual brokers).
- You “ought to know” what should reasonably have been revealed by a “reasonable search” of information available to you. This means you must conduct a reasonable search for, and disclose, material information that is available to you. It is important to note that this includes not only information held within your organisation but also outside it, including information held by your agents, and also held by persons and entities who are to be covered by the insurance.
- You must not make any misrepresentations to your insurer.
- You must provide the information to your insurer in a manner which would be “reasonably clear and accessible” to a prudent insurer. This is a new, standalone, duty.

### 1.2 WHAT IS “MATERIAL”?

Under English law, every circumstance is material if it would influence the judgement of a prudent insurer in fixing the premium and/or the terms of the insurance and/or determining whether to accept the risk. This refers to “any” prudent insurer, not just the insurer who has been offered the risk. A circumstance may be material even if disclosure would not necessarily lead to an increased premium or declinature of the risk.

In the context of business insurance policies, insurers are likely to regard matters such as, but not limited to, the examples detailed in Appendix 1 of this document as material. If you are unsure whether a fact or circumstance should be disclosed, or whether the duty to disclose information continues throughout the period of a particular policy, we recommend that you disclose the information anyway, as failure to do so may lead to your

insurer reducing its claim payment, applying additional terms or even avoiding the policy.

### 1.3 WHEN TO DISCLOSE

Your duty of disclosure applies throughout the negotiations preceding the placing of your policy until your insurer has agreed to accept the risk and has set the terms, price, and level of participation, and the contract has been finalised.

After the policy has been placed, the duty of disclosure arises again if you wish to make changes to the policy so that your insurer takes additional risk, when there is an extension of the policy period and when a policy condition requires you to advise your insurer of a specific increase or alteration in risk. The duty to disclose material facts and circumstances arises again during the renewal process.

### 1.4 FAILURE TO DISCLOSE

The consequences of failing to disclose a material fact or circumstance will depend on the precise terms of your insurance policy and on whether the policy was placed (or varied) before 12 August 2016.

#### (i) If your policy is placed or renewed (or varied) before 12 August 2016

If your policy is placed or renewed (or varied) before 12 August 2016 and if you fail to disclose, or misrepresent, a material fact or circumstance which you know or ought to know, your insurer may avoid the contract (or the variation), that is, it may treat the contract as if it had never existed. Your insurer may be entitled to recover any claims paid out to you prior to the avoidance, and in some circumstances may be entitled to keep the premium.

#### (ii) If your policy is placed or renewed (or varied) on or after 12 August 2016



For policies placed on or after 12 August 2016 the new Insurance Act 2015 will apply and your insurer's remedy for non-disclosure will depend on whether or not your failure to disclose, or misrepresentation, was deliberate or reckless:

- If you *deliberately* or *recklessly* fail to comply with your duties, your insurer will be able to avoid the policy, that is, to treat it as if it had never existed, and may retain the premium.
- If your failure to comply with your duties was not deliberate or reckless, your insurer's remedy will depend on what the insurer can show it would have done had a fair presentation of the risk been made:
  - If your insurer would not have entered into the contract on any terms, it can still avoid the contract but must return the premium;
  - If your insurer would have entered into the contract but on different terms (not relating to premium), the contract may be treated as if it included those terms from the outset;
  - If your insurer would have entered into the contract but would have charged a higher premium, the amount paid on a claim may be reduced proportionately.

The Insurance Act 2015 will also apply to variations made to policies on or after 12 August 2016 even if the policy inception prior to this date<sup>4</sup>.

## 2. CONSUMER INSURANCE CONTRACTS

### 2.1 YOUR OBLIGATIONS

If you are a consumer insured (i.e. a person taking out insurance for purposes wholly or mainly unrelated to your business, trade, or profession), and the insurance policy is governed by English law, then you must:

- Take reasonable care to provide complete, accurate, and honest answers to the questions we and your insurers ask, and not to make a misrepresentation, when you take out, make changes to, and renew your policy.

- You should note that if on renewal of your policy you do not meet your insurer's request to confirm or change details you have previously given, this may amount to a misrepresentation.
- Please also tell us if there are any changes to the information set out in the Statement of Fact, Certificate of Insurance (if applicable), or on your Schedule.
- If any of the information provided by you changes after you purchase or renew your policy and during the period of your policy please provide us with details.

### 2.2 FAILURE TO DISCLOSE

If any of the information provided by you is not complete and accurate:

- Your insurer may cancel your policy and treat it as if it never existed; or
- Your insurer may refuse to pay any claim, or
- Your insurer may not pay any claim in full, or
- Your insurer may revise the premium and/or change the compulsory excess, or
- The extent of the cover may be affected.

For motor insurance it is an offence under Road Traffic legislation to provide incomplete or inaccurate information to the questions asked in your application for the purpose of obtaining a certificate of motor insurance.

Insurers recommend you keep a record (including copies of letters) of all information provided to them or us for your future reference.

The above duties arise before the policy is placed, when it is varied or extended and when it is renewed. The duties may also arise during the policy period if the policy contains a condition which requires you to advise your insurer of a specific increase or alteration in risk.

If you are not sure whether your insurer needs particular information, we recommend that you provide it to them anyway.

<sup>4</sup> In the event of a breach of the duty of fair presentation in relation to a variation made on or after 12 August 2016, the insurer will have a similar range of proportionate remedies available to it, depending on whether the breach was deliberate or reckless and what the insurer can show it would have done had the duty not been breached. This may result in the insurer treating the policy as if the variation was never made, reducing your claim payment, applying additional terms, or even avoiding the entire policy.



## APPENDIX 1

### NON-EXHAUSTIVE ILLUSTRATIVE EXAMPLES OF MATERIAL INFORMATION

Circumstances which may be considered material are:

- Special or unusual facts relating to the risk.
- Any particular concerns which led you to seek insurance cover for the risk.
- Anything which would generally be understood as being something that should be disclosed for the type of risk in question.

By way of example:

#### GENERAL INFORMATION ABOUT YOUR BUSINESS

- Business activity (or change to business activity), including processes, products, and geographic presence.
- New companies, markets, acquisitions, or disposals.
- Additional premises/insurable items.
- Changes to premises.
- Higher than ordinary degree of risk or liability (specific to your business or industry-specific).
- Business financial status.
- Loss history/experience, including paid and outstanding claims and potential claims/circumstances/incidents/losses that were not reported as claims (whether insured or not).
- Details of criminal charges and convictions of your organisation, its directors or employees; regulatory investigations or enforcement/health and safety investigations and prosecutions.
- Any insurers' previous declinatures, refusals to renew, imposed terms/restrictions in cover, mid-term cancellations, etc.

#### MATERIAL DAMAGE POLICIES

- Changes in construction and/or purpose.
- New/amended processes.
- Changes to fire protections.
- Increased storage of hazardous materials/attractive stock.
- Any attempted break-in or arson attack.
- Use of temporary/third party premises.

#### LIABILITY POLICIES

- Changes to business activities (including disclosing historic activities that have ceased).
- The creation or acquisition of new companies for which cover is required.
- Products exported to, or work in, overseas territories (particularly the USA or Canada).
- Work in or on hazardous locations such as offshore installations.
- Health and safety investigations/prosecutions.

#### MOTOR FLEET POLICIES

- Driving convictions.
- Corporate investigations/prosecutions.
- Undisclosed accidents.
- Changes to vehicle performance.
- Change of use of vehicle.

#### BUSINESS PERSONAL ACCIDENT AND TRAVEL POLICIES

- Changes to business activities.
- Material differences in the travel pattern (different geographies, number of journeys, etc.).

## REMEMBER – THIS LIST PROVIDES EXAMPLES ONLY. IF IN DOUBT – DISCLOSE.

For more information about the duty of disclosure and fair presentation, please contact us.

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