



The Solicitor's Guide to
Employment Protection Services

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Guide to Employment Protection Insurance and retainers


Introduction

Solicitors all over the country face the challenge of new forms of competition from quasi-legal competitors and before-the-event insurers who offer cost-effective legal advice and insurance indemnity.

Their 'pitch' is quite compelling – “advice when you need it and if there is a claim we will represent you and meet your legal costs - and we will do all this for a fixed monthly fee.”

Many of these competitors operate from a lower cost base than most law firms and while some question the quality of their service it can be difficult to compare service offerings as the cost difference can be hard to quantify.

The long-term effect of this newer forms of competition – it's estimated that more than 1m UK businesses have BTE employment insurance in one form or another – is to deny solicitors work opportunity. The answer is to provide an insurance policy that is linked to your own advice and guarantees that your law firm gets the claims handling work at pre-agreed fee levels.

 ***When one client calls you unexpectedly for simple advice it's considered a nuisance – when 100 clients call you regularly it's called a business!***

There are two elements to competing for this business- a retainer fee for legal advice and the insurance indemnity itself.

In the following notes we will brief you on both employment retainers and insurance offerings.


To compete against non-law firms it is important to get the core service priced correctly and to then use insurance cost-effectively to pay for representation and awards of compensation.

Since policies generally provide indemnity only after the internal grievance process is completed and as the cost of employment insurance is mostly driven by the cost of representation, its important to understand that if you fix a high charge rate for work on insurance claims when in fact the client is low risk and unlikely to make a claim, then you will potentially over-price the total service cost.

Retainers – a different business model

It's important to understand that retainer based services are a different business model. A traditional legal department's business model cash flow is unpredictable and you are often providing an emergency service for an employer that has already had a problem. This can justify higher hourly rates.

In contrast, retainer business provides regular monthly income and whilst the routine work can fluctuate, by building a volume of this type of work the cost base can be reduced as it becomes viable to employ more junior staff to handle day-to-day administration.

 ***We advocate using insurance wisely, to 'flatten' the risk of unexpected exposure to your own services.***

In simple terms, the retainer pays for 'pastoral' care and the insurance is designed to indemnify representation costs and pay for settlements when a claim occurs.

The best policies, such as our own Purely or Absolute employment, will define a claim as occurring once the clients' internal grievance process has been completed. This means that advice provided up to the end of the grievance process is paid for by your retainer, while advice and representation after this point is paid by the insurance.

Remember - If the employer is unlikely to have a claim, there will never be any earnings from insurance claims work, so if insurance is fixed at a high representation rate, you could over-price the total package.

What's in a retainer?

There is no standard definition of a 'retainer' or anything like a market wide understanding of how much to charge for them.

The extent to which a retainer provides documentation drafting services varies from 'D-I-Y' template services (not popular) to fully bespoke drafting services.

Most retainers provide unlimited telephone and email advice for the period and almost all exclude TUPE and redundancy programmes as well as intellectual property issues (e.g. pursuit claims) and collective bargaining. These are then charged for separately.

Most retainers provide for an initial employment review without which you, as the adviser, cannot understand the contract wordings and processes in place. This review or 'health check' is sometimes done by telephone or more often, for relationship reasons, by a visit.

It's usual to spread the cost of the initial review or health-check over the life of the contract rather than to charge the employer for (say) half a day's work plus travel. Increasingly the initial review is offered 'free' as a marketing device to build the relationship.

The key issue in pricing a retainer is to look at the employer's likely demands on your service in terms of how 'needy' they will be on a day to day basis and the likelihood of them creating an ET situation. The profile of the staff (permanent/ seasonal / low or high paid etc.) and the employer's attitude to employees is key.

It is appropriate to charge extra for the pastoral care of more 'needy' clients but if they are very cautious and unlikely to ever have an ET claim, reflect this in the cost of the insurance (see below).

You cannot expect to get every retainer price right every year, by definition workload will fluctuate, so a spread of clients is the key to making regular profit.

Insurance

Employment insurance policies differ widely but the most important issue is who makes the judgment call on 'prospects of success'. We can make a strong case that if the insurer is sole arbiter then the policy is not worth the paper it is written on (as with many BTE policies) and that is because they have an inherent conflict of interest.

If the advice and representation is provided by the insured's own chosen solicitor the policy is much more likely to fulfil expectations – and pay up!

The biggest drivers of the cost of insurance premium are the previous claim record and the cost of representation: since 70% or more of the claims cost met by insurers will be for representation costs rather than the 'settlement'.

Practical steps



Step 1 – EPF exemption

Insurance is a regulated activity and in order to be able to offer indemnity insurance in tandem with your own legal services your firm must obtain permission from the SRA and be entered on the EPF register of Exempt Professional Firms. Provided you are on this register, we are allowed to offer employment insurance to your clients.



Step 2 – a claims handling agreement

In order to provide representation on behalf of your client your firm will need to be pre-approved by the insurer and to enter into a claims handling agreement for agreed terms.

This is where you need to reflect carefully on your choice of insurance provider.

There are several employment insurance schemes that are offered by Intermediaries who are ‘tied’ to one insurer. They often will insist on a minimum numbers of clients being insured and/or a contractual ‘exclusivity’ to use only them.

At Straight Solutions we stand or fall on our service and competitiveness. We do not require an exclusive commitment to us and we will also allow you the flexibility of cover and terms and to charge varying claims handling rates as appropriate to your own risk assessment of individual clients.

Understanding policy wordings:



What is usually covered?

At first blush, policies may look fairly homogenous, stating that they will indemnify compensatory awards and representation costs up to stated financial limits.

The devil of course is in the detail: reporting conditions, who judges the prospects of success, who is appointed to handle the claim, the trigger point for a claim, any fees payable for using your own choice of solicitor, co-insurance clauses or excesses, limited damages etc.

Understanding the terms within policies is key to knowing if they can be trusted to pay up as required, but there are key questions;

Who decides whether a claim is accepted and who can run the claim?

This is solely down to the insurer and they set a ‘prospects of success’ test, you may expect them to decide in their own favour to decline claims and to minimise their own exposure in ways not always in the interests of the employer. Our policies usually have no ‘prospects of success test’ – the one used to rule out claims - as many others do.

Who is agreed as the provider of advice?

If it is not recorded in advance, how can you know whether the insurers claims department will accept the advice was ‘right’? Our policies have closed off this loophole by creating a causal link between the advice provider and the claim trigger – we pre-nominate whose advice is on the record and who will handle the claim (this will be you - the introducing law firm).

As a generalisation, unless an employment policy specifically states who will provide the advice that is to be followed then it is not worth the paper it is printed on.



What is not usually covered?

There are two major exclusions common to all employment policies;

Pre-existing issues

Not surprisingly insurers do not want to be exploited by clients who take out insurance just to make a claim (akin to insuring a house that is already on fire) so an exclusion of existing matters known at the time of application is standard market practice and many also have mandatory waiting periods to exclude claim notifications within say, the first 60, 90 or 180 days of cover.

Contractual payments

These payments – e.g. for notice pay, statutory redundancy, overtime, bonuses – are excluded by policies simply because unscrupulous employers could otherwise simply ‘abandon’ their responsibilities and dump them on insurers. In the same context, protective awards are usually regarded as protected contractual payments.



Definitions

1) **Limit of indemnity**

This is usually selected for each client and is the sum insured or the maximum that the insurer will pay for any one event (i.e. for both representation costs and settlements). There is also an “aggregate” limit in every policy and this represents the maximum sum an insurer will pay in total for any one year. When considering the appropriate sum insured (higher limits do cost more) look at the profile of staffing and wages and consider the maximum likely award.

2) **TUPE cover**

This is often excluded from retainers and may be offered as an extension to an employment policy. In reality many clients may not require this cover and it can be inappropriate for some smaller businesses. None the less our policies cover TUPE related claims as standard.

3) **Contract breach or Restrictive Covenants Cover**

This is generally not covered by standard policies. The cover will be for either enforcing or defending a contractual breach of contract and may cover for example the cost of an Injunction.

As such covers are always subject to reasonable prospects of success, checking drafting or revising the clients’ existing contracts is a fee earning opportunity for solicitors

4) **Excesses**

These may apply to costs or awards, or both. Generally insurers expect the client to feel a little pain with an excess.

Excess’s will vary from one insurer to another but we are able to offer substantial discounts for voluntary excesses.

5) **Definition of an ‘employment claim’**

The majority of insurers have historically determined the trigger point for an employment dispute as being the point where an employer is in receipt of an ET1. Under all of our policies we determine an employment dispute claim as being where the grievance procedure has been exhausted.

Within our claims handling agreement, as the clients’ nominated solicitor you will be empowered to assess the merits of each claim or potential claim (subject to insurer sign-off)

6) **Prospects of success**

The ‘prospects of success clause’ is a widely used standard wording and is usually defined as being 51% - i.e. that there is a better chance of winning than losing.

It is not an ideal clause to work with as the issue of who determines the prospects is crucial and of course prospects can change - leading to arguments over costs to date or representation being denied by insurers.

In reality, it is unlikely that everyone can agree on whether a successful claim is 49, 50 or 51% but what we can say with certainty is that if the decision is solely at the insurers' discretion then they will rule in their own favour.

We offer policies that do not have this clause and while they will cost a bit more these policies give greater client satisfaction and protect your own brand values.

7) **Restricted cover**

An example is where cover applies to only (say) representation costs or Awards only.

These restrictions may seem cost-effective but create very difficult in claim situations where there is say, an offer to settle that the insurer wishes to reject but the client wants to accept because they are bearing their own costs.

Some trade association policies completely exclude awards of compensation. Or as we have seen, they will not cover both general and special damages.

The extent of these restrictions can mean the prospect of a crippling award against a small business being uninsured.

8) **Wages or Payroll**

This is the usual figure on which premiums are based and definitions vary. As wages or payroll is the measure of exposure used by most employment insurers the wider definitions mean more expensive premiums.

We define annual wages as payroll (gross wages, salaries, bonuses only) but some insurers require employers' pension and N.I. contributions to be included (adding c.17% to the declared figure).

9) **Employees extra protection**

This valuable extension means that (at the employers' option) personal representation is extended to managers in civil proceedings brought under legislation for unlawful discrimination or defence of an employee as a trustee of the employer's pension fund.

10) **Crisis Communications** – a standard extension of ours that is particularly useful for Charities, Schools and Care Homes, this provides professional HR advice when faced with a serious risk to the business – e.g. adverse publicity from a safeguarding issue.

Our Straight-forward approach



What we offer:

Our insurances give your clients a choice of employment indemnity policies under our Total Legal Care brand:

Essential Employment and our market leading Absolute Employment are examples of extremely wide package covers that automatically include restrictive covenants, compliance and legal defence ((Health and Safety prosecutions) and employees extra protection.

The only difference between the two packages is that Absolute has no 'prospects' test and costs more as it responds to more claim situations (and protects your 'brand' better). In competition, we would always advocate Absolute as the first choice for a cover advantage over most competitors.

Our newly launched Purely Employment policy is similar to Absolute in that employment claims are not prospects tested but it allows a client to pick and mix additional sections of cover.

We would prefer Purely Employment for larger clients as it allows you to isolate employment as an issue and separate it from other areas of insurance where clients may have alternative policies.

- 1) **Essential Employment Package:** this policy is equivalent to a 'market standard' in terms of cover and importantly is subject to a "reasonable prospect of success" clause. The policy will only provide indemnity if the claim has a better than 51% prospect of being successful.

As we mentioned the "reasonable prospects" clause is market-wide – and is usually shown in the policy wording of providers such as Peninsula, Mentor and many others. To better these competitors you need our Absolute policy.

- 2) **Absolute Employment:** we think this policy was originally unique as employment claims are **not** subject to the "reasonable prospects of success" clause, meaning that claims can be paid even in those cases where the client may have accidentally prejudiced their position, for example in a failure to follow the correct procedure 'to the letter.'

BOTH Absolute and Essential Employment also include extensions of cover for TUPE, Employee Extra Protection, Restrictive Covenants, Compliance, Legal Defence, Statutory Licence defence and Crisis Communications

- 3) **Purely Employment:** Designed for larger clients who want to tailor their employment insurance so that it stands alone outside of any other insurance programme.

The core cover comprises Employment protection and compensation awards (without the 'prospects test' and with no standard excesses) with TUPE plus Employees extra protection and Crisis Communications.

To this core cover the clients may then add extras if required for: Compliance and Legal Defence, Statutory Licence and Restrictive covenants



How we calculate insurance premiums:

There are a number of factors

1. **The sum insured or limit of indemnity (LOI).**

The usual options are:

£50,000.00 any one claim with an aggregate of £500,000.00 in any one year

£100,000.00 any one claim with an aggregate of £1,000,000 in any one year

£250,000 any one claims with an aggregate of £1,000,000 in any one year

For the majority of SME's a sum insured of £50,000.00 any one claim with an aggregate of £500,000.00 would usually be sufficient, however, we advise companies who employ staff with higher salaries (e.g. 30K or over) that they should take a higher limit of £100,000.00

As a general guide there is about a 12% difference between each pricing band, so £100k / £1m aggregate cost 12% more than £50,000.00 / aggregate of £500,000.00

2. **The Gross annual wage-roll**

This would normally include bonuses and overtime but exclude employer NI contributions and staff benefits. On some schemes we provide pricing on a simple Headcount basis but this tends to work out a little dearer for most clients and has complications relative to counting part-time and zero hours staff.

3. **Type of cover required**

This is a choice between Purely Employment, Absolute or Essential Employment cover.

Absolute policies generally do cost more than Essential policies but they are still very competitive against standard market offerings and are the policies that will usually give you an edge over competition and will provide the most client satisfaction.

Purely employment is cheaper for the core employment risk and as a 'pick and mix' policy suits larger clients better (particularly if they have a sophisticated insurance portfolio already).

4. **Your hourly charge out rate.**

Naturally, the higher the solicitor's hourly charge-out rate the higher the cost of the premium. This is because 70%+ of claim costs are for the representation element and this reflects in premiums charged. Broadly speaking a policy paying claims work at £200 per hour will cost twice as much as one paying £100 per hour. The majority of our policies are priced to a rate of £150 per hour.

It is important to recognise that many HR competitors have a low cost base often working on £80.00 to £100.00 per hour. It is vital for solicitors who want to be competitive on tenders to recognise that employment insurance 'flattens' the risk of their retainer being under-priced since if the expected volume of work is exceeded by claims the unexpected claims work will be paid for by insurance. So policies offering lower charging rates e.g. £100 per hour are not so unpalatable as they may seem at first blush as after all, the client may never have a claim. The key issue is to ensure that your overall package price for advice and indemnity secures you a client.

5. **Claims Experience.**

The past may be the only guide to the future, so details of previous claims (post grievance matters) are essential to an insurer's evaluation of risk.

Where an employer has had employment dispute(s) in the previous 3 years we require a brief description of the dispute, date of incident, and the defence costs and awards incurred.

We offer substantial No Claims Discounts where the client has been claim free for a number of years.

6. **Cover extensions:**

Less well known extensions not mentioned above:

Self employed contractors – covers the contingent risk of them asserting employment rights.

Volunteers and Temporary workers – often not within the usual definition of an ‘employee’ but a discrimination risk can exist even if there is no employment contract.

Crisis Communications – a standard extension of ours that is particularly useful for Charities, Schools and Care Homes, this provides professional HR advice when faced with a serious risk to the business – e.g. safeguarding issue.

7. **Level of excess.**

Sizeable discounts can be offered for voluntary excesses, for example if the client will bear the first £1000 of any claim. Larger excesses are particularly attractive to very large business entities.

We hope you find these notes of interest and look forward to working with you. If you have any questions that have not been covered please feel free to call.

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COMING SOON – The Straight Solutions Employment Sales Guide

A guide to selling retainer based insurance.