

## **COVID-19 BUSINESS INSURANCE CHECKLIST**

**Check your commercial property insurance policy for business income, extra expense, dependent properties, crisis management, business travel and meeting cancellation and contract penalties insurance coverage.**

- Is the business shuttered because an employee has COVID-19 or the virus is present at the premises? A business that must suspend operations because of COVID-19 potentially has insurance coverage for its lost income and extra expense. The existence and scope of coverage will, of course, depend upon individual circumstances and the specific wording of the property insurance policy. The business should carefully examine its policies, and err on the side of submitting a formal notice of claim. Whiteman Osterman & Hanna LLP is available to assist.
- Is the property policy written on an “all-risk” form? An “all-risk” policy generally covers any direct physical “loss” or “damage” to covered property, unless specifically excluded or limited by the terms of the policy. Arguably, “loss” has a meaning that is distinct from “damage,” and some courts agree, interpreting that term to provide coverage for the *loss of use* of covered property under certain circumstances—even where the covered property is not physically damaged or destroyed. By the same token, where a business is quarantined or shuttered because an employee has taken ill with COVID-19, the mere presence of coronavirus molecules in the premises arguably constitutes such a covered “loss.”
- Are operations suspended because key suppliers are shuttered by the presence of coronavirus where *they* are? The policy should be examined for potential “dependent properties” coverage. Where a key supplier’s business is disrupted by coronavirus contamination (as above), such “dependent properties” coverage potentially affords coverage the resulting interruption of the insured’s own business.
- Is the business shuttered without coronavirus present on site or at a dependent property? If so, the business should still examine its property policy for coverage extensions such as the following:
  - Business interruption coverage where access and egress are restricted due to a covered “loss” to neighboring properties and/or due to governmental order (which may extend to quarantine, evacuation, shelter in place or curfew orders);

- Crisis management expense, potentially including loss from cancellation of meetings or business travel, contract penalties and/or public relations expense.
  
- Is there a “virus” exclusion? Since 2006, many property insurance carriers have added a “virus exclusion” to their policies. The present pandemic will test the scope of that exclusion. The presence of such an exclusion should not deter the business from notifying the insurer of its claim, however. Under New York law, the insurer has the burden to prove that the exclusion applies unambiguously. The language will be read in light of common speech and the reasonable expectations of the ordinary business policyholder, and if it is ambiguous, it will be read narrowly against the insurer. The business should also investigate whether the exclusion was added to an existing policy without adequate notice, regulatory approval or reduction in premium.
  
- Is there a “fungi and bacteria” exclusion? If virus is not expressly mentioned in the exclusionary clause, a court is likely to hold that the exclusion does not bar coverage.
  
- Is there a “pollution” exclusion? Similarly, if virus is not expressly mentioned in the exclusionary clause, a court is likely to hold that the exclusion does not apply. Additionally, New York courts hold that the pollution exclusion is intended to apply to contamination of the outdoor environment, and may not apply to indoor exposures.

**Check your employment practices liability policy for potential coverage against claims arising from employment-related decision-making.**

- Has the business laid off employees or changed the circumstances of their employment? A business concerned that coronavirus-related layoffs, furloughs and changes in the conditions of employment might trigger a spate of wrongful termination claims will want to take a close look at its employment practices liability policy (“EPLI”). EPLI coverage is frequently incorporated in a directors and officers liability package policy (“D&O”), but sometimes it stands alone. Claims for employee benefits and breach of contract damages are generally not covered, but front-pay and back-pay may be compensated. Defense costs are fronted by carriers under some policies; in other policies, they are paid only upon determination that the ultimate liability is covered. Check the policy carefully. EPLI policies are written on a “claims-made” basis, which means they have a very short shelf life. Consequently, a delay in

providing notice of a claim or potential claim can cause coverage gaps. Consider notifying the EPLI insurer of a layoff as an “occurrence that may give rise to a claim”. Then follow up with written notice to the insurer promptly upon the receipt of suit papers, a letter threatening suit, a request to toll the statute of limitations, or a demand for mediation or arbitration.

**Check your directors and officers liability policy for potential coverage against claims for economic loss arising from corporate decision-making.** Coverage forms differ, but generally such policies reimburse amounts paid by way of damages and defense expense for third-party claims for economic loss arising out of error or breach of duty in a director’s or officer’s performance of his or her duties for the business. Often, employees are insured as well. There may also be direct coverage for claims against the business arising out of such errors or breaches of duty. Coverage is written on a “claims-made” basis, and so prompt reporting to the insurer is crucial, as it is with EPLI.

**Check your commercial general liability policy for potential coverage against claims arising from bodily injury or property damage.** A claim against the business for illness or property damage caused by exposure to the coronavirus through the business’s premises, services or products may trigger coverage under the business’s general liability policy. The policy may be written on a “claims-made” or “occurrence” basis, the latter having the ability to respond to claims made long after the policy expires, so long as the injury or damage took place during the policy period. The general liability insurer often has a duty to defend the business.

- Is there a claim that the business defamed a competitor over its coronavirus response? The personal injury liability/advertising injury liability coverage part of the general liability should be examined for potential coverage for defamation in this context.
- Is there a claim that the business wrongfully evicted its tenants? The personal injury liability/advertising injury liability coverage part may also afford some coverage against such claims for wrongful eviction.
- Does the general liability policy contain a “communicable disease” or “virus” exclusion? The scope of such an exclusion will be tested in the current pandemic, as will the scope of the “virus” exclusion in the property policy. However, even if such an exclusion is present, that should not deter the business from notifying its insurer of a claim, suit or an occurrence

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that may someday give rise to a suit against the business. Exclusions for “pollution,” without more, are unlikely to bar coverage for the reasons discussed above.

Whiteman Osterman & Hanna can assist with these issues and more, as you and your business work to navigate the novel and difficult decisions arising from the COVID-19 pandemic. For assistance with insurance issues, please contact:

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