



Brenner, Saltzman & Wallman LLP

Attorneys at Law – Established 1963

COVID 19 AND INSURANCE

Dated April 7, 2020

As directives issue to continue closure of non-essential businesses, businesses are searching for all possible sources of relief for the many impacts of this serious disruption. They may wonder what their insurance can do for them. Insurance can be a resource to address many—but not all—impacts of COVID 19. This alert will help you determine whether your insurance can help your business, and what steps to take to make it work as well as possible for you. Most typical business insurance policies have several sections, setting out coverage for “Property,” “General Liability,” “Auto” and “Workers Compensation.” Other kinds of insurance which are regularly available to protect businesses from different risks include Cyber Insurance, Employment Practices Liability Insurance and Directors and Officers Insurance. These additional coverages can come in stand alone policies or as “endorsements” that are part of lengthy “commercial package” policies. You may want to check with your broker to see which coverages it arranged for your business.

If you choose to start by looking at your insurance yourself, there are two key places to look first to understand what coverages you have. First, look for pages titled, “Declarations.” These pages generally contain a list of the different kinds of insurance contained in the policy, and may even have an index pointing you where to look. The Declarations will also provide a quick description of how much coverage the policy offers in different categories, and when each coverage may kick in, whether after the passage of a certain amount of time or after your business has already paid out a certain amount in losses. There may be an overall Declarations page, and then Declarations for each kind of insurance.

Second, page through the policies for “Endorsements.” The Endorsements are key to understanding what coverage you really have, because they may present important changes to the main policy forms. Some “endorsements” may actually be separate kinds of coverages added to the main policy. Cyber insurance and Employment Practices Liability insurance regularly appear as endorsements on business policies. Other Endorsements may add more coverage by increasing the limits of available coverage, removing exclusions or changing definitions to expand the scope of coverage. Endorsements can also limit coverage through these same mechanisms.

The following discussion identifies what kinds of coverage may cover different risks and/or losses arising from COVID 19.

Loss of income. Check your Property insurance *and* check for different endorsements offering *business interruption or lost profits insurance*. Generally, property sections of policies may offer some coverage when a business is shut down for different reasons. Usually, business interruption coverage is written to cover when a business cannot operate because of physical damage to a building, equipment, vehicles or other tangible materials needed to perform the work of the business. Insurers have been asked whether business interruption insurance covers losses resulting from government orders to close businesses to avoid the risk that workers will spread COVID 19. The initial response from insurers has been that business interruption coverage does not pay for these losses, because these losses do not result from any physical damage to tangible property, and the orders blocking

The information contained herein is provided as an accommodation and for informational purposes only. This information may not reflect the most current legal developments, and it may not be applicable to your specific circumstances. Do not act upon this information without seeking legal counsel. This information does not constitute legal advice or create an attorney-client relationship with BSW. Do not send us information until we authorize you to send that information to us and we have sent you a letter confirming BSW will represent you.

access to the businesses are not issued because an area was so damaged that someone going into the area would face risk of injury or because it would be harder for government to respond to a hazard.

This may not be the end of the story. Legislatures in a number of states, including NY, CT and NJ, have proposed bills to address this issue. Courts in some states have found physical damage to exist from smoke, smells or certain gases. COVID 19 is known to remain on surfaces like smoke, or travel like gases. While proving physical damage from COVID 19 is viewed as a big obstacle to this kind of coverage, stay tuned.

Property and General Liability policies may also contain exclusions for injuries and damage arising from “viruses.” Some similar exclusions only bar coverage for claims arising from mold and bacteria. You have to read these exclusions to be sure which version you have. An exclusion for injury from viruses may bar coverage for COVID 19 claims.

Lawsuits claiming that someone got COVID 19 at your business or that your business contaminated their property with COVID 19. Your Commercial General Liability is the coverage most likely to apply to these kinds of claims. However, insurers may challenge coverage by claiming that no “accident” occurred, just exposure to a virus, or that the “pollution exclusion” applies, with COVID 19 interpreted as a “contaminant”. How these efforts to bar coverage will be treated by courts could vary state to state, which interpret what qualifies as an “accident” or “occurrence” differently, and, as discussed above, define “pollution” differently. As mentioned under “property” insurance, you will need to look out for Virus Exclusions, which may bar coverage for these claims.

Claims from employees. Workers Compensation insurance applies to injuries that are occupationally caused. Most professionals in this field believe that workers (and employers) will find it hard to prove that someone caught COVID 19 while working—as opposed to being out in the community or at home. Health care workers who treat COVID 19 infected patients or employees sent in to clean or disinfect areas occupied by people who tested positive with the disease may qualify for Workers Compensation. Evaluation of these claims will be very case by case.

Employment Practices Liability Policies may cover claims that someone whom your business laid off or discharged was treated unfairly and differently than other personnel, because they were older or required additional accommodation to allow them to work safely, or that a COVID 19 work reduction was just an excuse for what was really discrimination because of their race or faith.

Cyber claims. Cyber criminals are seeking out additional vulnerabilities which arise when so many people work from home, in settings where IT professionals cannot monitor network activity as closely, and employees may use devices which are not protected by all the monitoring software that exists on business networks. Frankly, it is also easier for employees to zip off to check out new websites with information about the pandemic, or to respond to offers for protective equipment, or reply to someone who appears to be a long, lost friend, checking in to see how they are doing during the pandemic. Financial and personal information that would be shared only on relatively well-monitored, internal networks now is sent over wi-fi and exterior internet links, creating openings for hackers and trolls not present during normal, on-site operations. The first line of defense from cyber losses and claims should be reminding or training employees how to protect their data, as well as company and customer data, from improper distribution or capture. Cyber insurance comes *after* this first line of protection. Cyber insurance can cover a business’s own data losses or exposure to ransom, as well as claims from customers that their data was stolen or their system was hacked through your business’s e-contacts with them.

Claims by clients and others that your business’s failure to properly handle COVID 19 caused them financial harm. A section above talked about claims of physical or “bodily” injury, as insurance terms it, or claims of property damage. Where someone brings a claim that you or your business caused them or their business a purely financial loss by mismanaging how you or your business responded to COVID 19 and/or various governmental directives regarding the pandemic, your Commercial General Liability policy, generally,

will not cover that claim. Instead, a Professional Liability or Directors and Officers Insurance Policy may provide coverage. These policies are intended to cover improper actions or failures to act by a company, its officers, board members, or employees, or even former members of those groups, which cause injury from business operations within particular, described activity or risk that the policy usually defines as the scope of coverage. The language of these policies varies far more than the Business Property and Liability policies, so no specific further discussion is offered here. Instead, you or your counsel or broker needs to read these policies carefully to see if they may cover a particular claim.

What should you *do* to make insurance work best for you.

- **Figure out what insurance you have now.**
- **Document losses and events carefully. Do not discard data or documents. Get employee recollections and documentation from their remote work locations, and ask them to forward information to you promptly, as events are evolving. If you have a potentially large claim, consider engaging professional assistance with documentation, such a forensic accountant.**
- **Give notice of a potential claim. Many businesses believe that just giving notice will increase insurance premiums or make insurers drop them. Industry specialists observe that this rarely happens—unless the insurer actually pays on the claim or defends it. Making a claim, by itself, should not harm you.**
- **Consider getting advice from coverage professionals. They may see avenues for coverage or advise you to collect different information to bolster your claim.**
- **Be patient—legislatures and courts are just starting to deal with this novel catastrophe. Where coverage may seem unlikely now, the scene may change. Be ready with information and documents.**

The information above provides only general guidance. Policy language, as well as facts and circumstances of claims and losses, can vary widely and impact the availability of insurance. If you would like BSW's assistance or have questions regarding how you may best access insurance to cover COVID 19 losses, please, contact Holly Winger, hwinger@bswlaw.com.