

COVID-19: Coverage Considerations for Your Commercial Insurance Policies

As the Coronavirus (COVID-19) continues to impact the global economy, individual businesses are beginning to be affected if they have not already felt the effects. Your company's insurance program may provide relief in some instances depending on the type of loss sustained and the facts and circumstances that precipitated the damages. Below you will find discussion of various types of insurances that typically comprise an insurance program and how each policy may respond in the event of a loss. Before proceeding further, it is prudent to note that the following discussions deal with general circumstances and your individual policy language should be reviewed in relation to the specific facts of your claim in order to determine the potential for coverage.

Workers' Compensation

With individuals testing positive for COVID-19 in Pennsylvania and the surrounding states, employees will be questioning whether they can take advantage of Workers' Compensation ("WC") benefits not only for medical expenses but also for any missed time away from work during the quarantine period. Traditionally, for WC to respond to a claim, it must be determined that the employee's injury arose in the course of employment and is related thereto. In order to satisfy this burden, the claimant employee must establish that the transmission of the virus actually occurred in the course of their employment while they were furthering the interests of their employer. If an employee is able to satisfy this steep burden, they will likely be able to collect WC benefits as Diseases and Illnesses can be considered injuries under the WC Act.

Another way for an employee infected with the COVID-19 virus to pursue WC benefits is by establishing the contraction of an Occupational Disease as defined in Section 108(n) of the WC Act. Section 108(n) sets forth three (3) elements that must be met by the employee in order to satisfy their burden to qualify for benefits. An Occupational Disease refers to all other diseases (1) to which the claimant is exposed by reason of his / her employment; (2) which are casually related to the industry or occupation; and (3) the incidence of which is substantially greater in the industry or occupation than in the general population (emphasis added). If an employee is able to satisfy these three (3) elements, a rebuttable presumption of causation will be attached to their claim. It remains to be seen whether individuals not working directly in the healthcare or first responder industries will be able to demonstrate they are exposed to a substantially greater risk of contracting COVID-19 than those in the general population.

Unless the Pennsylvania WC Board issues a communication advising that certain individuals who test positive for COVID-19 are eligible for WC benefits, such as was recently done by the State of Washington, then employee claimants may have a difficult time qualifying for WC benefits under either scenario listed above due first and foremost to the requirement that contraction of the virus must have occurred during the course of employment while furthering the interests of their employer, which will be difficult to prove with medical certainty.

¹ See Section 301(c)(1) of the Act.

² The rebuttable presumption shifts the burden to the employer to present evidence showing the COVID-19 virus was contracted outside of work.

³ In Washington, claims from health care providers and first responders involving COVID-19 may be allowed as a work-related condition under certain circumstances.

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General Liability

Commercial General Liability (“CGL”) policies provide the potential for coverage (i.e. defense and indemnity) for the insured in the event of claims for bodily injury or property damage alleged by a third party. Such claims and lawsuits are already beginning to present themselves as recently evidenced by select cruise ship passengers who recently commenced a lawsuit against a cruise line asserting various causes of action including negligently exposing passengers to the virus after certain of the ships passengers tested positive for COVID-19. Any claimant seeking to recover on a claim for bodily injury would need to show the virus was contracted due to the insured’s negligence and be able to present concrete evidence detailing how, when, and where they became ill. Depending on the facts and circumstances of the individual case, confirmation of these details may be difficult.

Thus, while claimants will likely be able to present colorable arguments in support of their causes of action (likely to achieve at least notice pleading standards in state courts), insureds will need to thoroughly review their policy language to determine if coverage is indeed available. Many CGL policies contain exclusions for claims resulting from infectious diseases. If your policy contains such an exclusion, it is unlikely that your policy will respond to the loss.

Executive Liability (Directors & Officers and Errors & Omissions policies)

While insureds may not immediately think of their Directors and Officers (“D&O”) or Errors and Omissions (“E&O”) professional liability policies when presented with a claim related to COVID-19, such policies should be reviewed depending on the nature of the allegations. D&O policies may provide coverage for claims arising from shareholder lawsuits alleging that the insured acted unreasonably in response to the virus. For example, stakeholders may allege that management failed to develop adequate contingency plans, failed to develop supply chain alternatives, or failed to properly disclose financial risk, thus causing economic loss to the company. For E&O policy holders such as professional service providers, like hospitals or other medical care organizations, claims alleging that errors were made in the providing of such professional services should be evaluated for coverage.

As with any claim, all policy endorsements and exclusions should be reviewed when determining the potential for coverage. Notably, most D&O and E&O policies exclude coverage for bodily injury claims as well as claims based on fraud, dishonesty, and willful violations of law. The bodily injury requirement to obtain coverage is certainly a factor to examine closely and document accordingly as your organization undertakes the claims reporting process.

⁴ See *Weissberger v. Princess Cruise Lines Ltd.*, No. 2:20-cv-02267, U.S. District Court, Central District of California (Los Angeles). Weissberger and his wife filed suit against Princess Cruise Lines on or about February 27, 2020. It is unclear whether the Weissbergers will be successful in their pursuit to recover damages but the reality is that claims and lawsuits related to COVID-19 are beginning to materialize and insureds must be ready to defend themselves against such claims

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Event Cancellation Insurance

Organizers of large-scale events often purchase event cancellation insurance should circumstances arise requiring that the event be postponed or ultimately cancelled. Such policies help to offset any costs associated with the unexpected changes. In addition to events, businesses are cancelling conferences and meetings because of travel restrictions and other considerations based on the current state of national and global affairs. In each of these scenarios, event cancellation policies may provide coverage for costs and other expenses to help mitigate losses associated with the cancellation. When analyzing coverage under an event cancellation policy, it is important to carefully review your specific policy language as most event cancellation policies are tailored to the particular event being covered, which is different from the boilerplate language that makes up most other types of insurance contracts.

As with all types of insurance, however, carefully review the entire policy including applicable exclusions as many event cancellation policies contain exclusions for cancellations prompted by infectious disease. Significantly, in January 2020 many event cancellation policies began to include COVID-19 exclusions precipitated by the already anticipated global spread of the virus at that time. Thus any policies purchased from mid-January 2020 onward will likely contain a specific COVID-19 exclusion precluding coverage for any cancellation associated with the COVID-19 virus even if the policy does not directly exclude cancellation based on other types of infectious diseases.

Business Travel Insurance

If your company purchases business travel insurance as part of its insurance program, it is likely that certain travel plans have been altered if not cancelled all-together with the continued evolution of the COVID-19 pandemic. While policy language may differ slightly by carrier and each insurers' interpretation of their policy language impacts what coverage is provided, it is established at this point that COVID-19 is a "known event." Once something is considered a "known event", it is no longer considered sudden or unexpected. Therefore, any cancellations because of a "known event" (i.e. COVID-19) will not be covered under a travel policy if the policy was purchased after the circumstances leading to the cancellation became a "known event."

If you booked your trip and purchased the insurance before COVID-19 was included as a "known event", there is the potential for coverage should travel be cancelled. The language in your particular policy should be analyzed and the reasons for cancellation reviewed in relation to the policy language to determine whether there is coverage under the policy.

Key Takeaways / Preparing for a Claim

As is always the case, you should become familiar with the various coverages provided by your insurance policies in order to be better positioned to react once a claim is presented. We at Henderson Brothers are always available to discuss your specific policies in greater detail. When you become aware of a claim, you should immediately communicate it to us while simultaneously beginning to investigate the loss, track all expenses associated with the claim, and consider whether any third parties are responsible for the loss or may be affected by the claim.

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Conclusion

The spread of COVID-19 and resulting economic effects are rapidly changing. We will continue to monitor these developments and update our COVID-19 dedicated webpage accordingly. Furthermore, we have additional resources to assist in evaluating COVID-19 issues. This article is only partially reflective of all lines of coverage and all issues. For additional analysis and resources, please contact your insurance advisor.

Henderson Brothers, Inc. is providing this information on a general basis. The information contained herein is not intended to constitute legal or other professional advice and should not be relied upon in lieu of consultation with your own legal advisors. In the event you would like more information regarding your insurance coverage, please do not hesitate to reach out to us.