

COVID-19 COVERAGE – BUSINESS: FAQ

Frequently Asked Questions

Does my commercial policy include coverage for business disruption?

Business losses may encompass any area of loss, including lost income, business closures, supply chain disruptions, the costs associated with employee health care, and cleanup costs. With a standard commercial property policy, business interruption claims are only triggered by a physical loss or by damage to the property, typically caused by a triggering event such as a fire or earthquake. Pandemics don't traditionally result in damaged property, so most commercial property insurers do not cover business interruption losses arising from the outbreak of illness or disease.

For now, much is still unknown about how insurance policies will respond. The situation is fluid, extraordinary, and very much on-going. There are precedents and policy language that can be looked to for guidance. However, as the situation continues to evolve, new precedents could be set. Government orders and court rulings at the state and federal level may change long-standing policy inclusions and exclusions and what was previously known about policy coverage may become irrelevant.

What policies or insurance coverage MIGHT apply to COVID-19 related losses?

Workers' Compensation

Generally speaking, a communicable disease that affects the public is not typically considered for a workers' compensation claim. However, if COVID-19 is contracted during the course of employment, and due to the conditions in which the work was done, it may be considered a covered event. Whether the contraction of disease is considered occupational in nature will be left to individual states to determine. In the event an employee presents a claim of employment-related exposure or illness, it should be reported for a compensability determination.

However, any claim submission will face the inevitable difficulty of proving that the infection happened as a result of employment and not some other interaction.

Potential claim risks include:

- Healthcare workers contracting the virus in the healthcare facility.
- Airline or transportation worker who contracts the virus from a passenger.
- Service employees who contract the virus during a large gathering or event.

D&O

The potential exists for D&O litigation to arise based on an alleged misstatement or omission relating to the disclosure of COVID-19 impacts on the business. In the current environment of heightened D&O claim levels, there is a high likelihood of businesses D&O litigation relating to the COVID-19 outbreak.

Potential claim risks include:

- Claims could arise out of a company's leaders' alleged failure to manage the exposure of COVID-19. Potential claims could involve inadequate oversight or allegations of mismanagement.
- Insufficient or incorrect disclosures to investors regarding pandemic exposure as well as other potential risks (i.e., selective disclosure violations).
- Whenever a company's financial performance is materially impacted, and its stock price declines precipitously, there is always the chance of shareholder litigation or a regulatory investigation by the SEC or another federal agency. These investigations could include directors and officers personally.

Pollution

An Environmental Policy may offer some coverage for viruses, particularly for disinfection, but each policy is unique, and careful review will help determine full availability of coverage. Areas of environmental policy coverage generally include Bodily Injury, Property Damage and Cleanup Liability arising out of a Pollution Condition.

Coverage is generally customized to a business' risks, and there are many different forms, including site-specific, that cover scheduled locations, blanket environmental legal liability, which is non-location specific, Contractors Pollution Liability, Professional Pollution, and risk-specific coverage by industry verticals such as Healthcare or Energy.

The most likely scenario for coverage will be if your policy includes coverage for Disinfection/Decontamination Expenses, which may be subject to a sublimit or a governmental/public health reporting requirement. This coverage is for costs to clean and decontaminate a covered property after a disinfection event. The exclusions/restrictions referenced above may preclude coverage specifically for COVID-19 depending on the policy form.

While contingent business interruption coverage will be very difficult to trigger under a policy, there may be coverage for business interruption (most likely if tied to Disinfection Expenses).

Clients with coverage on a healthcare specific policy form may have some coverage for bodily injury, if the loss is not specific to a patient who is admitted and already incubating or manifesting symptoms of the virus. However, coverage could apply to infection of a third-party.

Contingent Business Interruption (“CBI”)

This type of insurance can be included as an extension to the standard property insurance or (less traditionally as very limited availability) as a standalone policy. These policies are designed to protect businesses against lost profits due to disruptions to the supply chain. These policies require physical damage at the supplier/customer premises as opposed to at the insured's premise. Again, physical damage by a covered peril is required to trigger coverage. Therefore, the standard CBI policy would not respond in the event suppliers are closed due to COVID-19.

In addition to coverage triggers, CBI insurance will have to involve proof of physical damage, and the policy will need to be examined for definitions of third parties, suppliers and customers.

Event Cancellation Insurance

Event cancellation insurance protects event revenues and expenses against the risks of cancellation, postponement, curtailment, relocation or abandonment of the event for reasons beyond the control of the event organizer.

Coverage can extend to perils such as communicable disease outbreaks, labor strikes, severe weather conditions, non-appearance of a key person, among others.

To clarify, however, attendees' or event organizers' fear of traveling or spreading a disease such as COVID-19 would not be considered a covered claim, given the cancellation was not beyond the control of the event organizers or attendees and there are generally exclusions for lack of interest or support for an event.

General Liability

In the event a non-employee becomes ill, a general liability policy will only provide coverage for direct injuries and damage to a third party's property for which you are legally liable. For COVID-19 or a similar health emergency, liability may arise out of a failure to protect others and their property against exposure to infection, and the policy may potentially cover this. However, some policies, including excess liability policies, may contain a communicable disease exclusion.

Any claim submission will face the inevitable difficulty of proving that the infection happened as a result of employment and not some other interaction.

Potential claim risks include:

- Customers at a restaurant linking virus contagion to an employee of the restaurant.
- Hotel guests contracting the virus from a general outbreak that originates at the hotel.
- A vendor's employee contracted the at a customer's location.
- A subcontractor's worker contracted the virus at an owner's construction site.

Management Liability

Many professional liability policies exclude coverage for claims arising out of bodily injury. However, for professions within the healthcare industry that have a special duty to protect the public from health issues, coverage for a pandemic event may be provided.

Potential claims risks include:

- If substandard replacement parts are commissioned due to supply chain disruption during COVID-19.
- A company did not adequately prepare alternate plans to avoid a negative impact.
- Cloud and Software as a Service (SaaS) companies may be at risk in the event COVID-19 prevents them from providing their services.

Travel Cancellation and Business Travel Accident Coverage

As of early February, carriers and underwriters are no longer including the threat of COVID-19 as a covered trigger for evacuation, cancellation and interruption benefits. "Cancel-for-any-reason" policies have even excluded the COVID-19 from their covered triggers. These policies, with specific exclusions, will only cover travelers who contract the virus. Risk management teams must determine the potential threat to employees before they decide to travel. 24/7 travel assistance services are still available for travelers around the globe to assist in booking passage home at the cost of the traveler.

Medical expenses for "illness," including infectious disease, are most often covered with Business Travel Accident policy and may exclude medical expenses covered by a Workers' Compensation policy.

Business travel accident policies may also include trip cancellation benefits if a covered person's trip is canceled due to an illness that renders them unable to travel. Trip delay or trip interruption coverage is typically included if the covered person contracts the infectious disease/illness or is quarantined by a medical or governmental authority while already traveling because of the presence of the infectious disease is suspected. It is important to note that most policies exclude coverage for travel to countries after a governmental authority has issued a travel advisory.

Business Income/Extra Expense

Included within most property insurance policies, business interruption coverage is intended to reimburse businesses for losses associated with an unexpected interruption of operations, including lost revenue, expenses, and the cost of temporarily relocating operations.

Generally in order to trigger coverage, the interruption in business must be the result of “direct physical loss or damage” to the type of property that is not otherwise excluded under the policy.

Most policies contain restrictions or exclusions for losses due to epidemics/pandemics, communicable diseases, or contamination and pollution, including viruses.

Civil (and/or Military) Authority

Civil authority policies are very specific on what is required to trigger coverage. The coverage is meant to address business losses that occur when a Civil Authority has prohibited access to an insured’s location. Typically, policies include distance qualifiers, time limits, along with additional restrictions/exclusions. Reading the coverage in its entirety is necessary to determine how it will respond in the event of a loss.

Ingress/Egress Coverage

Similar to Civil Authority coverage, this coverage is triggered by a business interruption event when access to the insured location is prohibited due to “direct physical damage of type insured against.” Typically, policies include distance qualifiers, time limits, along with additional restrictions/exclusions. Reading the coverage in its entirety is necessary to determine how it will respond in the event of a loss.

Stock Throughput Policies (STP)

Similar to a property liability policy, STP policies are primarily based on physical loss or damage to product. As a result, a similar analysis of policy form and potential coverage needs to be completed to identify potential business income and extra expense coverage, including third-party supply chain disruption and cargo accumulation clauses.

No matter what type of policy, when filing a claim, it is vital to quantifiably differentiate between specific loss drivers and to demonstrate the causal relationship between those triggers and sustained losses.

Is there anything else in my other policies that might cover me?

The “Interruption by communicable disease” Clause – Some policies may cover losses they include a clause known as “interruption by communicable disease.” If an employee or executive diagnosed with COVID-19 comes to work and exposes others, many employees or the entire employee base would need to be quarantined and the entire office or plant might have to be shut down. If this were to happen, “interruption by communicable disease” coverage could potentially pay decontamination costs, business downtime and property damage. However, claims triggered under this coverage are narrow and typically have low sub-limits.

Besides business disruption, what are some other areas of increased risk right now?

Cyber Risk and Special Crime

Cyber attackers are using COVID-19 as a new tactic against their targets, using the urgency and spread of misinformation to their advantage.

- Phishing or Social Engineering: By mentioning COVID-19, cyber attackers may attempt to lure employees into providing network credentials or unknowingly sending company funds.
- Ransomware Threats: COVID-19 is being used as the subject of attachments and in emails to aid in the delivery of ransomware (and other malware).

Potential media and privacy violations based on company updates regarding specific employees' health or release of other protected health information, could trigger privacy liability and / or regulatory scrutiny. Companies should be circumspect about sharing any information about an individual employee without that employee's express permission.

Network Business Interruption: Any loss of income attributable to disruption from a security failure. An example would be if your remote work force is unable to access the network due to a disruption. This is subject to a designated waiting period typically between six and twelve hours.

D&O

Given the volatility of the marketplace and how certain industries are being impacted, many companies may now need to consider restructuring as part of their strategic analysis, even if it is a worst-case scenario.

It is important to keep in mind the impact any type of restructuring would have on a company's D&O program. For any company considering any sort of restructuring, one very important item to consider is runoff/tail coverage for the D&O program. Protecting the personal assets of the individual directors and officers is often one of the most important considerations as companies go through this process. Funding this cost after a bankruptcy filing can be very challenging. It is important to discuss and plan for this well ahead of a filing.

No matter what type of policy, when filing a claim, it is vital to quantifiably differentiate between specific loss drivers and to demonstrate the causal relationship between those triggers and sustained losses.

We have not suffered any losses at this time, but is there a best practice about putting carriers on notice for potential claims?

Coverage for a specific claim ultimately depends upon the facts involving the claim. The insurance carrier has ultimate responsibility to determine coverage and compensability. As a broker we work to ensure all facts, jurisdiction particulars and potential coverage interpretations are taken into consideration to advocate for the most favorable outcome.

We continue to expect fluidity and every-changing court decisions surrounding coverages issues for COVID-19. We encourage our clients to contact us if there are questions regarding potential claims.

Specifically, contact us if:

- You become aware of a potential occurrence related to a third-party coming into contact with an infected employee while in the scope of employment.
- You become aware of an employee becoming sick while in the course of employment, including travel.

Our local mayor/municipality has required our premises to be closed (government mandate) to customers coming into the building. Is there insurance for the loss of sales or profits?

Typically, coverage for loss of sales or profits (a Business Interruption) is triggered when a covered “cause of loss” creates a slowdown or suspension of business operations. For some policies the inability to occupy a place of business due to the order of a governmental authority may be sufficient to afford coverage. However, this extension and breadth of coverage is uncommon, as most insurance policies define a covered “cause of loss” to include only direct physical loss or damage by a covered peril.

Furthermore, many policies expressly exclude (or severely limit) contagious diseases from coverage. Policies also often contain restrictions or exclusions related to pathogens, contamination and/or pollution, which embeds virus, disease or illness causing agents in the definition of contaminant.

Each case can vary as coverage will depend on the terms & conditions within a particular policy, the reason for the shutdown and the nature of the claim.

There are some instances in which coverage could apply – through extensions in coverage for communicable disease or non-physical damage business interruption coverage. However, these are not standard extensions of coverage provided by insurers.

More often property policies include restrictions or exclusions related to pathogens, contamination and/or pollution, which embeds virus, disease or illness causing agent in the definition of contaminant.

These limitations or exclusions would preclude a loss of income due to COVID-19 from triggering a covered business interruption loss under a property insurance policy, as could other standard exclusions related to loss or damage arising from delay, loss of market, loss of use or indirect or remote loss or damage.

We have tenants shutting down because the local authorities have required it. Is there coverage to us for loss of rents?

Similar to above, this would generally not trigger coverage under a Property Policy for Loss of Rents or Time Element coverages unless the interruption in business was the result of direct physical loss or damage by a covered peril under the policy. If, because of that physical loss or damage the rented space became untenable, there could be coverage for loss of rents under a property insurance policy. This coverage would be subject to the same restrictions as mentioned above in regard to possible exclusions for pathogens, contamination and/or pollution, which embeds virus, disease or illness causing agent in the definition of contaminant.

If tenants are shutting down simply due to broad mandates for closure of businesses, there would not usually be coverage under a property insurance policy for business interruption.

We are a not-for-profit organization highly dependent upon donations. We are in our peak season and we have had to cancel fundraising events involving dinners and auctions due to restrictions on the number of people who can assemble. Is there insurance coverage for the loss of our anticipated donations? Is there insurance coverage for the non-refundable deposits and expenses we have already paid?

Given the requirement for covered physical loss or damage to result in a business interruption in order for coverage to apply under most policies, there would not be recoverable loss of income based on traditional or standard Business Income insurance coverage.

However, some insurance carriers offer options to add extensions of coverage (or purchase the coverage separately) for event cancellation. Such coverage would need to have been purchased before a disrupting event such as COVID-19 given the existing knowledge of the likelihood of cancellations and related claims once an event as widespread as a pandemic has developed.

If we are required to shut down, are our employees' wages covered by insurance?

Business Income coverage within a property insurance policy can extend to cover payroll expenses, but coverage would require the shutdown to be the result of a covered property loss or damage which then resulted in business interruption loss.

While property policies can extend coverage for Ordinary Income and related wages under Business Interruption/Income coverage provisions, there still must be an insurable loss under the property insurance policy (i.e. physical loss or damage) in order to trigger recovery of business interruption damages.

What insurance coverage would be available if one of our customers alleges they contracted COVID-19 at our premises or from one of our employees?

The general liability policy is designed to provide a defense and pay damages that the insured becomes legally obligated to pay because of third-party bodily injury and property damage.

We have technicians that go into hospitals/homes/businesses to perform repair work. What insurance do I have if our employee contracts COVID-19 from doing so?

Employees who are exposed to the COVID-19 on the job and/or are injured by the disease by virtue of their occupation may file a workers compensation claim.

Workers' Compensation is governed by state law, but the impression is most of these cases will likely be deemed non-compensable, as the employee is in no greater risk than the general public. However, facts in each case are independent of any prior claims and **ALL** potential Workers' Compensation claims should be submitted timely for consideration by the insured's carrier.

Insurers could face claims from employees who are infected during work travel or from employers who are unable to perform the functions of their business (or to fulfill contracts or meet expectations) because of an ill workforce or one that is avoiding exposure.

Lastly, while exposure to and contracting COVID-19 is likely not a work injury, employers should consider the potential for this being deemed an occupational disease, if the virus was contracted as part of work.

The employee must prove the following:

- That the disease was caused by conditions characteristic of and peculiar to a particular occupation or employment, and
- That the disease was not an ordinary disease of life to which the general public was equally exposed.

If this is deemed an occupational disease, the matter is handled on a **PER EMPLOYEE** basis vs. per accident. Clients with large retentions could be at significant risk.

We source our products from overseas including China. Is there any insurance if the plants in China are unable to provide us with our products? What if the reason they could not get us our products was because the federal government put a ban on goods and people coming into the country?

Coverage could be available through Contingent Business Interruption, which extends coverage for an interruption in business to losses caused by the disruption in the business operations of an insured's supplier or customer, as opposed to the insured's business itself.

Many such policies require that the affected supplier or customer sustain a "direct physical loss or damage" to trigger coverage and that loss or damage must be insurable under the policy - including cause of loss, the damaged location being within the policy's coverage territory (China in this example), as well as the type of property damaged being included within the definition of insured property (or otherwise not excluded).

If the delay or inability to receive a product is due solely to a federal government ban, that would likely not be a covered loss under a traditional Property and Business Interruption insurance policy.

As a director & officer of my company, do I or our company have any liability if we are alleged to fail to act to take care of our employees or fail to warn about the impact COVID-19 could have on our business?

From a Directors & Officers standpoint, there is a possibility that claims from shareholders or investors could develop, especially if this pandemic is more long-term expected. Operational decisions and business actions (or inaction) in response to COVID-19 could be viewed as unreasonable or detrimental to profitability, causing financial harm to shareholders or investments. Shareholders may argue that management allegedly failed to develop adequate contingency plans, allegedly failed to observe protocols recommended or required by governmental authorities, and/or allegedly failed to properly disclose the risks of COVID-19 posed to the company's business and financial performance. This Covid-19 "Black Swan" event will cause hardship for most businesses and could shutter some. Many businesses will face supply chain shortages, labor challenges, as well as cash flow shortages, debt covenant violations and possibly bankruptcies, all of which could create allegations, rightly or wrongly, that boards and management neglected their fiduciary "duty of care" to shareholders and investors.

D&O (or similar) insurance may help – but given these are liability policies as opposed to providing first party costs coverage, the risk transfer value now might be secondary. For D&O policies, the specific definitions in the contract will govern coverage determinations, such as "wrongful act", "claim" and "insured person" and "insured entity". Further, all D&O policies have "Bodily Injury" exclusions and "Pollution" exclusions that could exclude or limit coverage. Standard "Contract", "Conduct" and "Insured versus Insured" exclusions could apply as well. It is recommended that all insureds and clients become familiar with reporting obligations under the policy, including the difference between a circumstance that could give rise to a claim versus an actual claim. Since all policies are different and given this is a fluid, "real-time" event that is unfolding, all clients and insureds that have circumstances that are developing into claims or actual claims should contact PayneWest immediately.

From an employment standpoint, the COVID-19 pandemic will most likely create tensions between capitalistic impulses and a safety-first employment mentality. Regardless of the calculus each business employs to weather this pandemic, federal employment law should be heeded. As businesses are assessing their response to COVID-19, employers should keep in mind multiple employment laws such as the Occupational Safety and Health Act, the Americans with Disabilities Act, Title VII of the Civil Rights Act, the Pregnancy Discrimination Act, the Family and Medical Leave Act, state workers' compensation laws and any federal or state anti-discrimination or disability laws. Many industries have or will be laying off large portions of their workforce. **Employers should contact an employment attorney with any questions.**

Employment Practices Liability (EPL) insurance may help, especially if claims develop due to supposed violations of any of the employment laws mentioned above. Many businesses are laying-off employees and dialing back operations to only critical functions. There very well could be defense expense coverage available, if not liability coverage, depending on the circumstances of the complaint or demand received. Unfortunately, EPL policies were not designed to protect businesses from pandemic fallout. All EPL policies have "Bodily Injury" exclusions, it is worth noting, as well as other policy provisions that could limit coverage. As mentioned above, it is recommended that all insureds and clients should become familiar with reporting obligations under the policy, including the difference between a circumstance that could give rise to a claim versus an actual claim. Since all policies are different and given this is a fluid, "real-time" event that is unfolding, all clients and insureds that have circumstances that are developing into claims or actual claims should contact PayneWest immediately.

Given the current situation, can we request special arrangements or relief in payment on our premium financial agreements?

We are in dialogue with those institutions that provide premium financing to insureds. As of this moment, those institutions are trying to figure out how to operate under this ever-changing environment, so things remain very fluid right now but there are not yet known options at this time.

We are monitoring legislation at the state and federal level to whether premium payment and/or cancellation relief is available. Please visit our website, PayneWest.com for up-to-date information.

As your agent, PayneWest does not adjudicate claims or interpret the policy terms and conditions. That responsibility lies with the insurance carrier. However, we can give you our interpretation of the potential terms and meaning that will be discussed during the claim process. If you feel you have a claim you wish to pursue, we will be more than happy to submit it on your behalf.

The information provided on COVID-19 and as relates to insurance coverage is an ever-changing topic. Any decisions by the courts or legislation enacted by state or federal authorities could alter the opinions provided above.

We also encourage clients to review contracts and other agreements for additional provisions which could provide recovery or other relief of capital commitments through force majeure or other clauses.