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Business Interruption Insurance Coverage, Workers' Compensation and OSHA Issues During COVID-19

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Welcome & Presenters



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COVID-19 in the Workplace: Workers' Compensation Insurance



Is COVID-19 Covered under Workers' Compensation?

- Occupational Disease v. “Ordinary Disease of Life”
- Certain Groups have additional Exposure such as first responders, Healthcare, child care workers for first responders, funeral directors
- Many states are enacting “presumption” rules and legislation (AL, AK, CA, IL*, LA, MA, NJ, NH, NM, NY, ND, MN, MI OH, PA, UT, VT, WA, WI)
- Some states expand the class of employees benefiting from presumption beyond first responders:
 - Kentucky includes child advocacy and rape crisis center workers, grocery store workers, etc.
 - California has created a presumption for all employees who test positive 14 days after *on-location* work

How does COVID-19 Affect the Cost of Future Insurance?

- Currently unclear
- Rates are determined by loss costs, which are the pure costs for insurers to cover claims
- The two factors are whether there will be a slowdown of the economy versus a high rate of COVID-19 cases
- Historically, when there are recessions, the number of overall claims goes down
 - Retention of the most skilled employees
 - Construction and manufacturing are slow to recover
 - More efficient and safe equipment
 - Employee's reluctance to report due to his or her perception on job security

Will COVID-19 impact my existing claims?

- The costs of current, existing claims will likely go up.
- This could impact your premiums for next year
- Why?
 - Limited availability of conservative and surgical treatments to get people back to work
 - More restrictive return-to-work market, particularly if the employee is not returning to his or her pre-injury employer

Workers' Compensation Liability and Work-From-Home Locations

- What is the workers' compensation liability for my company's workforce, working from home?
 - Does the injury "arise out of work"?
 - Did it occur in the "course and scope" of the employment?
 - Lunch breaks
 - Interplay with the "coming and going" rule and whether the premises is owned or controlled by the employer.
- Take detailed notes of any injury including what the employee was doing and where. If there is a credibility question, pull any data needed before it expires for later use.

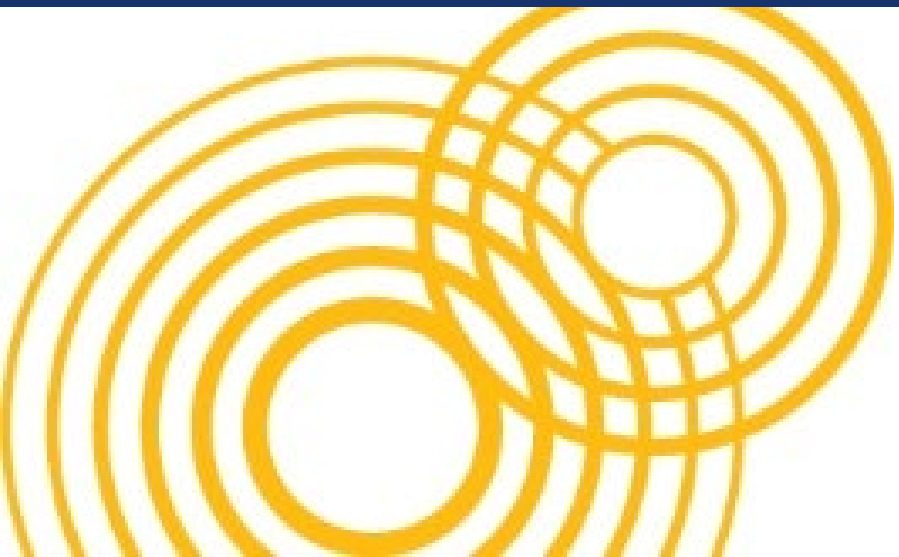
Workers Compensation and Return to Work on Location

- No clear guidance or safe harbor when considering questionnaires. ADA standards change when there is a “direct threat” to the health or safety of the individual or others.
- Questions regarding COVID-19 symptoms or exposure are potentially fine (depending on wording and “direct threat” designation).
- You must retain the information as a confidential medical record in compliance with the ADA.
 - Implement this policy uniformly.
 - Avoid questions that may elicit answers regarding underlying disabilities.

Workers Compensation and Return to Work on Location

- Medical certifications that an employee is fit to return to work are fine, but may be impractical due to the stress on the medical system.
- Do **not** request information regarding other medical conditions that the CDC says could make them especially vulnerable to influenza complications.
- For COVID-19, the EEOC has temporarily put out guidance that an employer may measure body temperature. Such information must be maintained as a confidential medical record.
- Please have the employees sign any questionnaire.
- You may want to include an acknowledgement of receipt of any new COVID-19 Policies, particularly safety provisions.*

Be Prepared for OSHA's Updated COVID-19 Guidance



Am I at higher risk for an OSHA inspection during the COVID-19 pandemic?

- OSHA is prioritizing inspections based on high and very high workplace risk levels for COVID-19 exposure. Most workers will be considered to be in lower or medium exposure risk levels.
- High and very high risk jobs include hospitals treating suspected and/or confirmed COVID-19 patients, nursing homes, laboratories, etc.
- Be prepared for eventual OSHA spot checks of random job sites for social distancing and PPE compliance.
- Update your written safety policies for COVID-19 considerations in the event of an OSHA inspection. When in doubt, get expert (medical and legal) help.

What happens if an employee sends a whistleblower complaint to OSHA?

- Employers should be prepared for significant increase in whistleblower complaints. OSHA is seeing an uptick in complaints related to COVID-19 issues, including workplace crowding and improper PPE use.
- OSHA is often sending letters to employers asking them to address the complaint. Employers should coordinate their response with outside counsel and respond to these letters immediately with responses to the specific issues outlined in the OSHA letter. Failing to respond to OSHA could trigger an inspection not just of the complaint, but your entire facility.
- Remember: OSHA citations can usually be entered into evidence in civil trials as evidence of negligence.

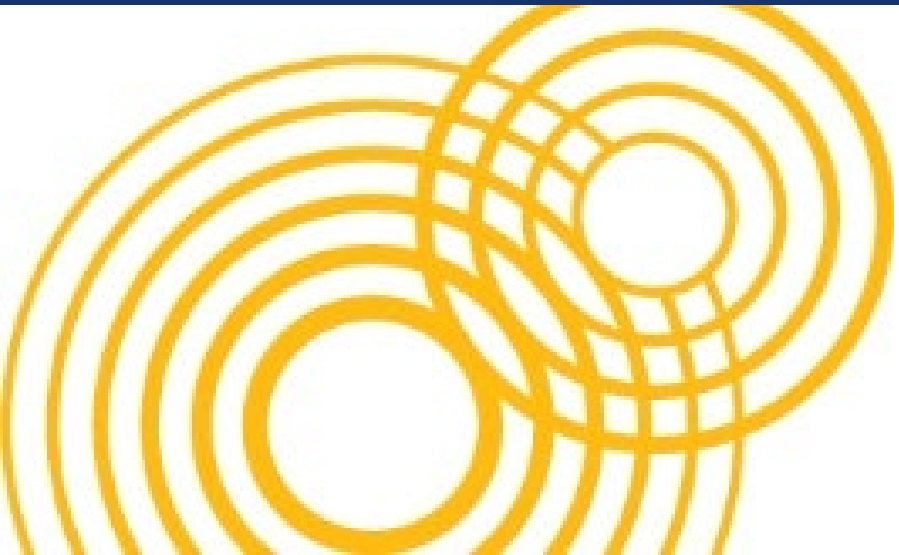
How can I prepare for OSHA inspections and enforcement actions during COVID-19?

- OSHA may inspect the entire facility.
- Employers should try to narrow the scope of the inspection to the specific complaint.
- Most violations be classified as “serious” violations (PPE).
- Remember: “Willful” violations are often used as evidence to support punitive damages in civil cases (and you may not have coverage for this).
- OSHA now has wider discretion to enforce certain rules (Respiratory Protection Standard (29 CFR 1910.134)). OSHA will assess whether the employer is making a “good-faith effort” ensure that workers use the most appropriate PPE.

What are my record-keeping requirements related to possible COVID-19 cases?

- OSHA has suspended injury and fatality reporting requirements related to COVID-19 for employers outside of the healthcare industry unless there is “objective evidence” that the COVID-19 related injury or fatality is work-related and the evidence was “reasonably available” to the employer.
- Outside counsel can assist employers in determining whether there is “objective evidence” of a COVID-19 related injury or fatality and ensure that employers are correctly reporting to OSHA.
- Employers should strictly interpret “objective evidence,” because including COVID-19 cases in an injury and illness log could be treated as an admission of “work-relatedness” in workers’ compensation and negligence claims filed by employees, negatively impacting your rates.

Business Interruption Insurance



Questions to Cover

- Giving Notice of a Claim
- Extraordinary Pandemic Situation
- Business Interruption Insurance
- OSHA
- Workers Compensation
- What is the role of insurance broker in interpreting policy provisions?
- How can we be of help in policy review?

If you think you have a claim, give notice now.

- Important of prompt notice
- Ease of giving notice.
- Will not negatively impact your premiums
- In the event that the laws we discuss change, you will have already given notice.

Extraordinary Times Call for Extraordinary Measures

- Historically after major disasters, lawmakers have changed insurance law or created new insurance vehicles.
 - Hurricane Andrew (1992)
 - Florida judges increasingly rule in favor of home and business owners and against insurers, particularly in bad faith cases.
 - Great expansion of reinsurance market
 - Hurricane Katrina (2005)
 - Judges eliminate anti-concurrent causation clauses from policies
 - September 11th
 - Terrorism Risk Insurance Act (TRIA)

Proposed Legislative Responses

- Multiple States: New Jersey, Ohio, South Carolina, Pennsylvania – framework to provide retroactive coverage and alter existing insurance policies to provide business interruption coverage
 - Bills would deem every insurance policy for property or business interruption in force from March 9 would cover COVID-19 claims, up to the policy's existing limits.
 - Bill would only apply to businesses with 100 or less employees
 - Insurers which pay claims can apply to State Insurance Regulator for reimbursement.
 - State would establish the reimbursement fund by taxing all insurers doing business within the state.
 - Bills are still in committees, are subject to change, and will be hotly litigated if passed.



Emerging Cases – over a dozen now

Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd's London, et al. (Orleans Parish, LA)

- New Orleans restaurant Oceana Grill alleges it is an insured under an “all risks” property policy issued by Lloyd’s that includes business interruption and an “extension of coverage in the event of the businesses closure by order of Civil Authority.”
- “The global pandemic is exacerbated by the fact that the deadly virus physically infects and stays on the surface of objects or materials, ‘fomites,’ for up to twenty-eight days, particularly in humid areas below eighty-four degrees.” Further, the complaint states that it is “clear that contamination of the insured premises by the Coronavirus would be a direct physical loss needing remediation to clean the surfaces of the establishment.”
- Argument is that the presence of the coronavirus causes physical loss to the affected premises

Emerging Cases

Choctaw Nation of Oklahoma v. Lexington Insurance Company, et. al. (Oklahoma)

- The Chickasaw and Choctaw nations seeking coverage under their business interruption insurance policies
- Tribes have temporarily closed their casinos, hotels, travel plazas and other businesses that have been impacted in various ways by the virus
- "[T]he property has been damaged by the virus and the pandemic because it cannot be used for its intended purpose." – Tribes' attorney
- Will also point to provisions that cover business interruptions by civil authority

Emerging Cases

Over 12 business interruption cases filed now(Oklahoma)

- Generally allege government closure orders have interrupted or halted business.
- Include claims from:
 - Thomas Keller's French Laundry restaurant
 - Sports bars in Tampa, Chicago, and other cities
 - Dive shop in Florida Keys
 - Theater in Indiana
 - Restaurant/theater in Texas with a Lloyd's policy which contained pandemic coverage
 - Sold by Lloyds' of London after Ebola outbreak

Purpose of Business Interruption “BI” Insurance

- Commonly sold with commercial property insurance
- If commercial property is damaged and operations are suspended, BI insurance provides coverage for business losses during a period of restoration
- Textbook examples are natural disasters or fires, damaging buildings and forcing operations to cease.

Contents of the Policy

- BI policies differ by insurance company and type of business insured
- Could be included in:
 - a commercial property policy,
 - a businessowner's package of policies,
 - a standalone policy, or
 - incorporated as part of a captive insurance company

How Courts Construe Coverage Provisions and Exclusions

- Two key hurdles to coverage:
 1. Is it a covered loss?
 2. Is the loss excluded from coverage?

Policy Interpretation

- Insurance policies are contracts subject to the same general rules of construction as other contracts, but with some unique elements
- Coverage provisions are construed broadly. In North Carolina, they are “liberally construed in favor of coverage.”
- Exclusions are construed narrowly and strictly
- Ambiguities are construed against the insurance company
- An ambiguity is created when a term is subject to more than one reasonable interpretation

Coverage Provisions

- Business Income
- Common coverage provision:

We will pay for the actual loss of Business Income you sustain due to the **necessary suspension of your operations during the period of restoration**. The suspension must be caused by **direct physical loss of or damage to property** at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations...



Coverage Provisions

- Insured has the burden to prove suspension of operations was caused by “physical loss or damage”
- Fact intensive inquiry – type of business, type of loss, terms of the policy
- These terms are generally undefined, so they require interpretation
- Courts have reached different conclusions on whether “physical loss or damage” requires tangible changes resulting in material damage to property



Coverage Provisions

- Some courts have held that contaminating conditions are a “physical loss” to property
- *Mellin v. Northern Security Ins. Co.*, 167 N.E. 544 (N.H. 2015) (cat odor from neighboring condominium)
- *Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) (ammonia discharge was a “physical loss”)



Coverage Provisions

- Contingent Business Interruption
- Insures against lost business if a supplier or customer's property suffers physical loss or damage
- For example, business is lost due to a supplier's factory being shut down in China due to COVID-19



Coverage Provisions

- A common Contingent Business Interruption provision:

This policy...is extended to cover the actual loss sustained by the Insured resulting from the necessary interruption of the business conducted by the Insured, whether partial or total, caused by loss, damage or destruction covered herein...to:

Property that directly or indirectly prevents **a supplier of goods**, services or information to the Insured from rendering their goods, services or information or property that directly or indirectly prevents a **receiver of goods**, services or information from the Insured from accepting or receiving the Insured's goods, services or information.



Coverage Provisions

- Insured has the burden to prove physical loss or damage to the other property
- Proof may be difficult, especially if a foreign supplier
- Policies may have sub-limits, waiting periods, and high deductibles



Coverage Provisions

- Civil Authority Coverage
- Insures against interruption of the insured's business, when an order of civil or military authority impairs access to the insured's property as a result of physical damage
- Does not require physical loss or damage to the insured's property
- Does require physical loss or damage to property at or near the insured's property that impairs access



Coverage Provisions

- Civil Authority Coverage does not apply to purely prophylactic measures by civil authorities in the absence of property damage

Examples:

- Airports being ordered to shut down following 9/11, based on the fear of future terrorist attacks
- General fear of contagion



Exclusions

- Even if a covered loss is shown, an exclusion may apply
- Since 2006, in the wake of the SARS epidemic, many policies contain an exclusion aimed directly at viruses:

We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.



Exclusions

- The insurer has the burden of proving the exclusion applies
- It will be narrowly construed
- The language of the exclusion is critical
- This specific exclusion may preclude coverage for COVID-19 claims even if they are an otherwise covered loss



Other Coverage Considerations

- Coverage is limited to the period of restoration
- That may be the time needed to promptly clean surfaces in the property
- COVID-19 stays alive on surfaces for a limited period
- Waiting periods prior to the period of restoration, and before benefits are available, can range from 24 hours to one week or more

Questions?

