

Insights

Insurance Coverage for COVID-19: Six Steps to Help Your Business Maximize Insurance Coverage That May Be Available to Offset COVID-19 Losses and Claims

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The novel Coronavirus (COVID-19) pandemic creates unprecedented and significant challenges for businesses of all sizes. In light of the rapidly evolving circumstances, Krieg DeVault has assembled a **COVID-19 Resource Center** and **Checklist** to help your business navigate this crisis. One important issue that should be front and center for businesses is insurance coverage.

Late Notice

At the outset we want to stress urgency for insurance coverage issues. Some insurance policies—such as first-party coverages and ‘claims made’ policies—contain hard deadlines that govern when and how notice is given to the insurance company. Failure to comply with these deadlines can jeopardize coverage. Additionally, delaying notice to your insurance company might lead your insurance company to deny coverage on the grounds of “late notice.” While there are legal doctrines that protect policyholders facing late notice arguments, it is better to avoid these issues altogether by promptly giving notice. Seek guidance from experienced coverage counsel if you need assistance in determining when to give notice.

Be Proactive and Open-Minded

There is already a lot of commentary about insurance coverage for COVID-19. Some of this commentary, in our view, is too one-sided: much of this commentary either says yes, there is definitively insurance coverage for COVID-19; or no, there is definitively not insurance coverage for COVID-19. For us, these views lack the nuance inevitably involved in complex insurance coverage issues. Instead, we recommend a pragmatic and proactive approach. Whether or not insurance coverage is available for COVID-19 related losses and claims will be very fact specific (both in terms of the particular losses/claims that are impacting your business and in terms of the specific coverages you purchased and the terms and conditions of those coverages). Additionally, it is very early in the COVID-19 pandemic, which means the coverage landscape for COVID-19 is underdeveloped. As a result, the most prudent course for businesses is to be proactive and get organized; work with skilled coverage counsel; err on the side of “over-notifying” your insurance companies; and position your business to take advantage of its insurance assets and any future developments in the COVID-19 coverage landscape that benefit policyholders.

Types of Coverages

Let's turn to the particular types of coverages that could be implicated. Business Interruption and Worker's Compensation are two obvious coverages potentially implicated. But, we recommend that all coverages should be considered, including but not limited to Commercial General Liability, Pollution, Property, Cyber, Professional Liability, Product Liability, Event Cancellation, Civil Authority Coverage and Employment Practices. Your company may have purchased specialized coverages that apply. But expectations within your business about the ability to recover from insurance should be appropriately tempered, as there is no guarantee for coverage. As stated above, coverage is a very fact-intensive inquiry that will depend on the particular coverages you purchased. Generally speaking, there are some exclusions that could present challenges. For example, Business Interruption coverage sometimes contains a "virus" exclusion. Some insurance policies have "communicable disease" exclusions. Whether or not COVID-19 impacts qualify as a "direct physical loss" under Business Interruption coverage will also be an issue.

Action Plan

Regardless of your particular coverages, we recommend the following action plan. Inventory and make sure you have copies of all of your policies. Get organized. Create a coverage chart. (Rely as much as possible on your insurance agent for these items.) Have a preliminary discussion with your insurance agent and coverage counsel to better understand what coverages you have and how those coverages may respond to COVID-19 losses and claims. Tip: if the insurance agent tells you there is or would likely be coverage (unlikely), get it in writing. Identify with particularity the impact that COVID-19 is having on your business and the implications for your insurance coverage. Work with your agent and attorneys to identify when the impact of COVID-19 is sufficiently acute to "trigger" coverage. Once coverage is triggered, promptly (i.e. immediately) give written notification to your agent and carriers. Our attorneys can assist you in preparing the notice and interfacing with your insurance companies. Although coverage and trigger are highly fact specific, generally we recommend to "over" notify. It is better to notify sooner rather than later and better to notify under all/more of your policies, than just some. Finally, do not assume coverage is not available. Do not accept at face value a statement from an agent or carrier there is no coverage. Have coverage determinations reviewed by coverage counsel.

Future Developments

It is difficult to predict what developments lie ahead. In Hurricane Katrina, as an example, policyholder attorneys won some early court victories that changed the coverage landscape. Already with COVID-19, at least two lawsuits have been reported in which Louisiana and California companies seek coverage for COVID-19 business losses. Many more lawsuits will likely be filed in the coming days and weeks. Some states are looking at potential legislative solutions to broaden Business Interruption coverages. These outcomes will take months if not years to play out. But while the landscape is developing and outcomes start to take shape, policyholders must be proactive. Policyholders cannot delay in getting organized and giving notice. Delaying notice to your insurance companies could jeopardize coverage.

Businesses should act promptly to maximize the chances of obtaining insurance coverage. Below is a simple action plan. This list of six bullet points should help your business chart a course to maximizing any insurance coverage it may have available to offset any COVID-19 related losses and claims:

- **Step 1. Inventory Your Policies:** Know what coverages you have. Get organized. Collect and inventory your policies. Create a coverage chart. (Rely as much as possible on your insurance agent for these items.)
- **Step 2. Identify the Impacts:** Identify the impact COVID-19 is having on your business. Identify future impacts and future claims that may result from COVID-19.
- **Step 3. Talk with Your Counsel and Agent:** Talk with your attorneys. Engage with a skilled coverage attorney. Talk with your insurance agent generally about potential coverage for a hypothetical COVID-19 circumstance or claim.
- **Step 4. Identify Trigger:** Work with your attorneys to identify when the impact of COVID-19 is sufficiently acute to “trigger” coverage. Generally we recommend to “over” notify (i.e., better to notify sooner rather than later and better to notify under all/more of your policies, than just some). Giving early notice should position your business to take advantage of any future developments that benefit policyholders, including legislative developments.
- **Step 5. Give Notice:** Once coverage is triggered, promptly (i.e. immediately) give written notification to your agent and carriers. Our attorneys can assist you in preparing the notice and interfacing with your insurance company.
- **Step 6. Do Not Assume No Coverage:** Do not assume coverage is not available. Do not accept at face value a statement from an agent or carrier there is no coverage. Have coverage determinations reviewed by coverage counsel.

Krieg DeVault LLP's **COVID-19 Task Force** and your individual Krieg DeVault attorney are standing by and available to help. We have established a 24-hour hotline for COVID-19 related needs at (317) 238-6281. Questions regarding the above information should be directed to **Matthew D. Neumann**.

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