**Reviewing Business Insurance Policies During the COVID-19 Pandemic**

As government-ordered shutdowns spread throughout the country, many businesses began to review their insurance policies to assess the types and extent of protection they may have for losses and claims related to the novel coronavirus. Insurance coverage is being scrutinized both with respect to potential affirmative claims that the company may be able to make, and as a defensive tool to wield against potential claims against the company.

In our efforts to provide our clients and other businesses with valuable and insightful commentary on the latest concerns surrounding the impact of the COVID-19 outbreak, we spoke with Joe DeLucchi, President & CEO of [CAL Insurance](https://mycalteam.com/). Together we highlight for you the different business-related insurance policies you should review during this time of national crisis.

**Business Interruption Insurance**

Business interruption insurance, also known as business income coverage, helps replace lost income and pay for extra expenses when a business is affected by a covered peril, like a fire, theft, wind, riots/looting or lightning. Typically, business interruption insurance is part of a property insurance policy. It serves as protection for the business or organization-owned real estate, tenant improvements in leased property, and even physical contents within the space like office or manufacturing equipment.

During an interruption to the business, there is either a dollar limit or a period of time at which coverage is extended to the policyholder. For example, if a fire at a restaurant damages a significant amount of the restaurant and forces a closure for six months, then business interruption insurance should cover continued operating expense including payroll for key staff as well as profit or loss for the specific period of indemnity. The insurance carrier will adjust the loss by reviewing financial statements from prior years, trends in revenues and expenses, tax returns, and seasonal differences.

One important caveat to business interruption insurance is that there needs to be a direct physical loss. However, there is another option known as civil authority. For example, if a fire happens near your business and the City shutdowns the area so patrons cannot access your business because of life safety concerns, you may be able to claim a loss under business interruption insurance, triggering civil authority.

Important to remember during this particular time is that business interruption policies typically include exclusions for viruses and bacteria – a legacy of the SARS outbreak in the early 2000s. COVID-19, of course, is a virus. This is where companies are running into problems.

Many businesses are quickly finding out that their business interruption policies simply do not apply in the world of COVID-19. Even government mandated shutdowns, at this point in time, are not enough to trigger business interruption coverage. In fact, in a [recent FAQ](http://www.insurance.ca.gov/01-consumers/140-catastrophes/FAQ-on-Business-Interruption-Insurance.cfm) released by the California Department of Insurance (CDI), they explained that, “While you should consult your policy, in general, coverage resulting from the actions of civil authority also requires physical damage to the insured premises caused by a covered peril.

If this is the case, a government ordered shutdown due to a pandemic may likely not be fully sufficient to trigger business interruption insurance coverage in the absence of physical damage to the insured property caused by a peril – whether that order is voluntary or mandatory.”

Beyond that, [one California business owner said](https://www.sandiegouniontribune.com/business/story/2020-04-05/companies-thought-they-were-covered-for-business-interruption-insurance-not-really) her insurance company advised her that, “The issuing of the orders from the state was not due to physical loss or damage, nor did it prohibit access to the described premises. It was issued to limit the spread of Coronavirus (COVID-19). The policy specifically excludes losses caused by or resulting from a virus or contamination.”

***So what can you do?***

The fact is, there is a lot going on right now. For example, there are currently some major lawsuits against insurance companies calling for them to offer coverage at this time. One of the most notable lawsuits is that filed on behalf of acclaimed [California restauranteur Thomas Keller](https://www.cnn.com/2020/03/27/business/thomas-keller-lawsuit-coronavirus-losses/index.html). Keller is seeking a court judgment to confirm his insurance company should cover coronavirus-related business losses. Restaurants in [New Orleans](https://nola.eater.com/2020/3/20/21188569/bourbon-street-oceana-grill-sues-coronavirus-coverage) and casinos owned by [Native American tribes](https://www.reuters.com/article/health-coronavirus-insurers/update-1-native-american-casino-owner-sues-lloyds-aig-over-coronavirus-losses-idUSL1N2BH1SQ) are doing the same.

On top of the lawsuits, state legislatures are doing their part to help companies suffering from COVID-19 related losses. In San Francisco, Supervisor Gordon Mar met with restaurant owners and other business leaders. Following these meetings, he proposed a [non-binding resolution](https://drive.google.com/file/d/1NqR7ioMCxQmtJHqbomdJemOaqM0P3_gd/view) in a recent Board of Supervisors meeting that declares “that COVID-19 is an extreme danger to the public because of its propensity to adhere to surfaces and spread, which causes property loss or damage.” The goal is to encourage insurance companies to pay out business interruption claims for losses during the shelter-in-place orders. Additional action has been taken by California Insurance Commissioner Ricardo Lara and the CDI, you can find more information on this below.

Also, on April 8, 2020, Mayor London Breed of San Francisco issued her 6th Supplemental Directive to her original COVID-19 State of Emergency Order. This directive may help move business interruption claims forward by affirming the coronavirus causes property loss and physical damage due to its ability to stay on surfaces.  While this currently at time of printing only applies to San Francisco, it is reasonable to expect other cities, counties and states adopting the same provision.

At this time, even with the above said, business owners are encouraged to submit claims. Consider putting together information about your perceived losses, when the shelter-in-place began, and any other pertinent data. From there, submit the claim and prepare for a rejection. The benefit of this is that this documentation is there and, should the government – local, state or federal – intervene, you have documented proof of a claim. With lawsuits emerging and government leaders recognizing the problem, it seems likely that some type of government assistance will be on the way. It’s best to have your files in order and documented proof of a filed claim.

**General Liability**

Commercial [general liability insurance](https://www.natlawreview.com/article/coronavirus-and-commerce-possible-insurance-implications) typically provides coverage for “all sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which the insurance applies.” More simply, this is coverage for third-party claims against the company. Most commonly, many general liability coverages include a fungal and/or bacterial exclusion. However, COVID-19 is a *virus*.

Generally, there is no virus exclusion under general liability coverage. Therefore, you may have coverage for general liability claims related to the coronavirus. For example, if a restaurant was open before a “stay-at-home” order and a patron contracted the virus, this should qualify as a third-party bodily injury allegation. If your business is served for an event like this, the first step is to reach out to your insurance broker to file your claim.

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**Workers Compensation**

The climate for workers has changed significantly. Some employers have been able to maintain ‘normal’ operations, some have employees on the frontlines fighting the spread of the virus, and some have entire offices working remotely. With a variety of working accommodations, keep a critical eye on workers compensation.

There are two main triggers for a compensable injury: the injury must occur**arising out of** and **in the course of** employment. So this is where things have now gotten a bit dicey. For example, if employees are forced to work from home and they injure themselves while on the clock, it technically triggers workers compensation. Also, other factors may come into play. For instance, employers may face ergonomic issues. Without the proper desk set up, chair, computer monitors, or such, workers may have grounds to file for workers compensation.

To combat some of these new challenges and situations, there are certain steps you as a business owner can take. There are ergonomic policies you can craft that meet OSHA compliance. You might also consider sharing work from home safety tips and meetings to keep your employees informed. It is best to communicate with your Human Resources personnel to ensure you are taking the right steps in these situations.

Also of note, Commissioner Lara [alerted insurance carriers](http://www.insurance.ca.gov/0400-news/0100-press-releases/2020/release036-2020.cfm) that all workers affected by COVID-19 while on the job are eligible for workers compensation benefits, regardless of immigration status. This includes workers engaged in frontline occupations such as health care, emergency services, food production, sales, and delivery, among others.

**Director & Officer Liability**

Many businesses have at least a minimal director & officer (D&O) liability policy. It is one of the broadest forms of liability coverage in the marketplace. Director & officer liability coverage comes into a play if a stakeholder alleges that they have been financially harmed due to decisions made by business management, it usually triggers a D&O allegation.

In this case, it is not outside the realm of reason that investors, for example, may come after your business claiming you did not make the proper management decisions or take the proper steps to plan for the pandemic outbreak. In these cases, the insurance carrier should assign counsel and prepare a proper defense on your behalf.

As a result of the current times, more exclusionary clauses are arising concerning communicable diseases. Make sure you take the time to review your policy and understand your coverage. This is an important practice for both the business owner and the acting CFO.

**Employment Practices Liability**

Another popular topic at the moment is employment practices liability insurance (EPLI). Many business owners are asking whether they have any exclusions if they furlough, lay off, or even fire employees due to COVID-19. The answer, often, is no.

Most, if not all, EPLI policies do not contain an exclusion for downsizing due to a virus or pandemic. Therefore, if you face a wrongful termination, Occupational Safety and Health Act, Family and Medical Leave Act, or Fair Labor Standards Act lawsuit (which are all [examples of claims](https://www.natlawreview.com/article/coronavirus-and-implications-employment-claims-and-insurance) that employers may see in the coming months), you should go immediately to your broker to file notice with the EPLI coverage carrier.

**Cyber Insurance**

Finally, another hot topic amidst the coronavirus outbreak is cyber insurance. Obviously, it is much easier to control the technological and cyber environment of your business when your employees are working out of your business locations. However, as more and more workers are going remote, there has been a rise in cyberattacks. While you can bolster your network and devices as best as you can for your remote employees, typically issues with cybersecurity arise from human error.

For instance, phishing email scams are on the rise and all it takes is for one employee to click on a link that they shouldn’t. Other areas of concern are employees using non-corporate email services (which do not have the same protection as internal networks), less secure wireless connections, and sharing unsecured files.

So what can you do right now? As far as cyber insurance policies go, they are hardly ever crafted the same. However, one major takeaway is this – your coverage may be limited in your cyber policy. It is extremely important for your CFO or whoever procures the policy to revisit the definition of “computer systems.”

Ideally, you would like the definition to include all employees on all devices, including personal computers and phones. As with the other policies on the above list, it is important to review the coverage you may have as it relates to cybersecurity.

**Help May Be on Its Way**

As the shelter-in-place orders enacted across the United States first began in the Bay Area, followed days later by California Governor Gavin Newsom’s decision to issue the first statewide shelter-in-place order, it is only fitting that California is at the forefront of tackling insurance related issues from the fallout.

On March 26, 2020, the CDI [issued a Business Interruption Survey Notice](http://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/upload/Business-Interruption-Survey-Final.pdf) to all admitted and non-admitted insurance companies. The survey requests certain information related to business interruption, civil authority, contingent business interruption, and supply chain coverage provided by commercial insurance policies. Responses to the survey were due on April 9.

In the meantime, CDI Commissioner Lara sent a letter to House Speaker Nancy Pelosi and the rest of California’s congressional delegation to [alert them](https://www.politico.com/states/california/story/2020/03/24/california-restaurants-plead-for-insurance-help-during-coronavirus-closures-1267873) of the scale of the business interruption crisis and call on them to take immediate action.

Also, Congresswoman Maxine Waters, Representative from Los Angeles County and Chairwoman of the House Financial Services Committee, released plans for a [Pandemic Risk Insurance Act (PRIA)](https://www.jdsupra.com/legalnews/pandemic-risk-insurance-act-a-tria-80957/). The act would create a reinsurance program similar to the Terrorism Risk Insurance Act (TRIA) created after the 9/11 terrorist attacks, mandating a prospective offer of pandemic business insurance coverage but capping the total losses that an insurance company would face. PRIA could become a component of a later installment of the CARES Act.

**Key Takeaways**

While the first priority during the coronavirus pandemic is the safety of your employees and customers, you should also look to mitigate the economic impact of the disease, including calling upon insurance tools as appropriate.

While coverage varies from business to business depending on policy language, companies would be well served to review all of their potentially applicable coverages, including, but not limited to, those discussed above.

**For more information on Joe DeLucchi and CAL Insurance, please**[**visit their site**](https://mycalteam.com/)**.**

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