



COVID-19: Risk Management & Coverage Considerations

As the coronavirus (COVID-19) pandemic continues to grow, the human toll has been widely reported. Our thoughts are with those who are ill, as well as loved ones of those that are sick or have lost their lives. The effort to protect Americans through social distancing as well as school and business closings has inevitably also resulted in widespread disruptions for businesses. For some companies, this has amounted to having employees work from home. For others (especially those in travel, dining and hospitality), it has meant a catastrophic reduction in revenues. While many of our clients have not yet experienced a substantial financial impact, we understand that many of your customers have and that freight volumes have slowed considerably. Those of you with physical freight handling operations may be operating on a reduced scale.

We have received numerous questions from our clients regarding the availability of insurance coverage for pandemics and how it can be purchased today. The short answer is that, for the most part, insurance is not available in the marketplace to cover COVID-19. There are three underlying reasons:

- Generally, insurance cannot be purchased once an event is foreseeable (for example, purchasing property insurance once a hurricane is predicted to impact you, etc.).
- Pandemics, by their very nature, are thought to be uninsurable. This is because they are so widespread that no insurer could comprehensively provide coverage and remain solvent.
- Even if it were possible to purchase coverage before the present situation unfolded, the premiums would have been astronomical and unaffordable.

What this all means is that while no new coverage can be purchased for the current COVID-19 pandemic, there may be little or no coverage available under existing business insurance policies either. In large part, this will depend on litigation outcomes, policy wording, exclusions in policies, and perhaps even legislative intervention.

While it remains to be seen if and how such intervention could unfold, companies should take steps to minimize suspension of business to the greatest extent possible, while still maintaining safe practices for essential operations that must continue. In the conclusion of this article, you will find a helpful link from the CDC on safe practices while maintaining operations.

We address in the below sections how different insurance policies may respond to pandemics, but ultimately, coverage determinations will be made by the insurance company and could be influenced by litigation and perhaps governmental action. Policies vary and every claim must be evaluated on its merits. For this reason, we encourage clients who believe they may have claims to submit them as instructed in their policies and to notify Avalon by email at claims@avalonrisk.com. We also suggest you consult with legal counsel for any contractual issues you are having due to the COVID-19 pandemic.

Property Coverage

Coverage under a property policy is usually triggered by a physical loss and/or damage to the property insured. It is widely agreed (but has been debated) that the threat of virus contamination does not constitute direct physical loss or damage to covered property. For this reason, it is doubtful that coverage would apply. That said, litigation over this issue has already commenced, and we will be watching for court rulings and further lawsuit activity. Many property insurance policies, however, do contain exclusions specifying that they do not cover losses resulting from viruses and bacteria. These exclusions will prove to be more difficult to argue. Some states such as [New York](#) and [Oregon](#) have issued notices indicating that business interruption insurance typically have exclusions for viral infections such as COVID-19.

The other area of property insurance that could come into play is Business Income & Extra

Expense coverage and Actions of the Civil Authority. Business Income & Extra Expense coverage is designed to compensate an insured for lost revenue resulting from a covered event or to pay additional expenses incurred to continue operations in the aftermath of a covered event. Most Business Income policies include an additional coverage for *Action of the Civil Authority*. Civil Authority coverage applies when the insured's premises has not been damaged, but the Civil Authority has prohibited access to the insured's location as a result of a public safety hazard in that area resulting from a covered cause of loss. Here again, the proximate cause of loss is questionable and may also be specifically excluded or subject to litigation as discussed above.

Some policies may provide a small amount of coverage for decontamination costs through coverage extensions. For example, our Business Owner's Policy with New York Marine & General (ProSight) includes a Coverage Extension (unless rejected by the insured) that provides limited coverage for decontamination Extra Expenses resulting from Communicable Diseases, up to \$10,000. This is intended to cover costs to evacuate, disinfect and test to confirm disinfection of a covered premises when ordered by Public Health Officials.

General Liability Coverage

Many companies purchase Casualty (liability) under either a Business Owners' Policy (BOP) or a Commercial General Liability Policy (CGL). These policies cover injury, personal injury, and property damage suffered by third parties for which the insured is legally liable. Coverage could exist under these policies if an insured is held responsible for spreading the virus to visitors during an office visit or business function they hosted. However, many policies will have endorsements that exclude communicable diseases or exclude pollution broadly enough to encompass viruses. In cases where the policy does not contain such exclusions, there could potentially be coverage or at least the duty to defend a lawsuit.

Workers' Compensation

Under the Workers' Compensation laws of most states, employees may be entitled to receive benefits for "occupational diseases." Employees are not able to receive benefits for "ordinary diseases." For most workers, this means that they would not be entitled to workers' compensation benefits for COVID-19. If it could be shown that a workers' exposure definitively occurred while working, they may qualify for benefits. For employees not in the healthcare field or whose work does not take them on extended travels, proving that the exposure was work-related will likely be difficult.

Combined Transit Liability

As supply chains are increasingly disrupted by COVID-19, claims may begin to arise related to cargo that is either delayed during transit or where on-time delivery cannot be accomplished. Combined Transit Liability (CTL) policies typically exclude claims related to delay and/or loss of market or deterioration due to delay. An argument may be made that an insurance company's Duty to Defend is triggered if negligence, error or omission are alleged in the complaint with respect to claims related to delay, loss of market and/or deterioration due to delay. However, there is a Duty to Defend only if there is a potential for coverage for the loss under the policy. If the underlying cause(s), i.e. pandemic, viruses, etc. is/are not covered, the insurance company may, at worst, outrightly decide to decline to defend or, at best, defend under a Reservation of Rights. As to the latter, the insurance company may decide to file a Declaratory Action to allow it to withdraw defense without bad faith exposure. Meanwhile, there is no extra expense coverage for delays due the same underlying cause(s), however, there could be limited coverage in the event the consignee abandons the freight altogether and expenses are incurred to remove the cargo from the port, terminal or warehouse.

Marine Insurance

Marine Cargo Insurance policies provide all-risk coverage if the shipment is insured but will also exclude claims due to delay. While some policies have extensions for refrigerated cargo, coverage is typically triggered by a breakdown of the refrigeration equipment, not simply by a delay in transit. For perishable or non-perishable goods, coverage for more traditional loss or damage claims that occur during a delay may often be covered (for instance, if a shipment were to be stolen while it was delayed in a trans-shipment warehouse). While the Shippers Interest cargo policies will not respond to extra expenses incurred during the transit of the goods, including demurrage and/or deviation charges, they will continue to insure the goods against physical loss or damage during the deviation until the goods are delivered to their final destination.

Remote Work Considerations

As an increasing number of employees are working from home, employers need to consider the insurance implications of this change. Areas of immediate concern are:

1) Off-premises property: Many property policies automatically include this coverage, but at a relatively modest limit. Insureds should be certain that their limits adequately contemplate company property that employees have taken home and that they have guidelines in place for the employee's use and safeguarding of the equipment.

2) Data security on laptops: (See Cyber Liability Section below)

3) Workers' Compensation: Workers' compensation policies are constructed as follows:

3A States – Generally speaking, this section of the policy lists the states where the insured has offices and conducts regular business operations. **As employees work from home for extended periods, if not already listed, the states where employees reside should be added as 3A states.** As a general rule, you should be cognizant of your offices near bordering states (I.e. employees who live in NJ but work at your NY office).

3C Other States – This part of the policy lists other states in which you may have incidental operations. For those states listed in 3C, coverage automatically extends when new operations begin during the policy term and lasts throughout the policy term. Coverage must be transferred to 3A States upon renewal or, at latest, within 30 days of the renewal.

There are certain considerations for Assigned Risk or State Fund policies. Those policies tend to have extra-territorial limitations (which means coverage does not extend beyond the borders of the state or is very limited) and likely have no automatic "3C Other States" coverage. Work operations commencing in another state may require a new policy for that state.

We recommend that the WC Policy be reviewed to ensure all states with active operations are listed and that all states (other than ND, OH, WA, WY which are monopolistic) are listed in 3C section of the policy.

If your company begins operations in or has employees working from home in ND, OH, WA or WY, please contact your local Avalon representative if you require additional information on obtaining State Fund coverage in those states.

Force Majeure

A force majeure event is an event that is beyond or outside the control of a contracting party that prevents that party from performing its obligations under the contract. Force majeure provisions in contracts are strictly construed and how the event is defined is key. Hence, whether quarantines, business shutdowns or travel restrictions related to COVID-19 constitute force majeure will depend on the wording used in the contract. For example, if a contract defines force majeure as “An Act of God” and the event triggering the force majeure is a voluntary work from home or quarantine directive, such directive may not fall within the force majeure definition. But, if the force majeure specifically includes, i.e. pandemic, there may be a better argument for relying on force majeure to excuse performance. We recommend that you have your counsel review your contracts to determine whether there are force majeure provisions and whether their definitions are specific enough to encompass the disruptions brought about by COVID-19.

Bonds

The pandemic has caused supply chain disruptions globally, which is contributing to loss of revenue. Payments from your customers may have slowed along with flow of freight volumes. We've also been hearing from our clients that importers are having difficulty making their duty payments on time.

US Customs & Border Protection (CBP) issued [CSMS message 42097586](#) which addressed the process for requesting approvals for delays in making duty payments. However, on March 26, 2020, CBP issued [CSMS message 42161666](#) providing additional guidance regarding entry summary payments. CBP advised that they are no longer accepting requests for additional days for payment. CBP will retain the right to allow additional days for narrow circumstances, including a physical inability to file entry or payments, due to technology outages or port closures.

Lisa Gelsomino, President/CEO of Avalon, is on the COAC committee and has confirmed that COAC has submitted a universal plan to CBP along with NCBFAA and other organizations that we hope CBP will consider. As you may know, the IRS has provided a 90-day extension to file and pay taxes from April 15th to July 15th. Also, in Canada, the Canada Border Services Agency (CBSA) has provided a [45-day waiver](#) of late filing penalties.

As there are additional developments, we will continue to communicate these. In the meantime, please provide the IOR # for any importer that received approval delay payments and the approval you received from CBP to our Bond Underwriting Department at bondunderwriting@avalonrisk.com. CBP has indicated that their system may automatically issue Liquidated Damages, and we will need to work with you to get these canceled or mitigated.

The United States Council for International Business (USCIB) [advised](#) that that they will work with Foreign National Guaranteeing Associations and National Customs Administrations to attempt to mitigate any ATA Carnet claims for U.S. issued Carnets that are caused by restrictions in the country of re-exportation due to the virus.

Credit Insurance

If you currently purchase credit insurance, it may protect your Accounts Receivables from bad debt exposure. However, this will not cover non-payments due to disputes if cargo is not delivered, abandoned, or delayed due to the impact of COVID-19. At this time, we also encourage you to review your payment terms and contracts with all importers, carriers, and third-party vendors. We would not recommend extended payment terms unless CBP or Carriers provide specific approval.

Crime Issues

One of the things that many companies will have to deal with as they have employees work remotely is the sending and receiving of paper checks. Many payments today are handled electronically (ACH, EFT, Wire Transfer) but paper checks are still commonplace. By necessity, the trend away from paper checks and towards electronic payments will likely accelerate in the coming months. Criminals are aware of this and will try to exploit weaknesses. **When a vendor or agent asks you to re-direct payments to a new account, routing number, etc., be vigilant in verifying that the requestor is who they purport to be. Criminals can easily spoof emails to make them appear legitimate.** If you know a payee personally, picking up the phone is usually the best way to confirm the legitimacy of a request to change payment details. Avoid using the contact information in the email requesting the payment or wire transfer. **We recommend all transactions be verified, especially where new payment instructions have been received.**

Finally, be sure that your Crime policy is up to date and includes “Social Engineering” coverage. “Social Engineering” refers to voluntary parting with money when the insured is induced into sending funds to unrightful parties by trickery, fraudulent impersonation or other means. There are a variety of methods for this type of deception. For example, cyber criminals are taking advantage of COVID-19 and sending phishing emails with subject lines such as “Coronavirus Safety Measure”. The emails usually contain malicious attachments or links to fraudulent websites to trick victims into revealing sensitive information.

Cyber Liability Issues

If your employees are working from home, remember that they could be connecting from an unsecure home network. This may mean that while your controller is compiling your monthly financial statements, a malicious actor could be reading all of your corporate data and posting it on the internet or worse, holding it for ransom. **Make certain that employees follow protocols established by your IT professionals and be sure that your Cyber Liability coverage is up to date.** Be sure that employees having possession of laptops are instructed to safeguard these devices as well as the data on them. Also, remember to file potential claims in a timely manner as there is generally a time limit to notify the insurer of a loss once discovered by you. Note “Social Engineering” coverage discussed in the Crime Section is also often available on Cyber policies.

Employment Practices Liability

COVID-19 and the need for social distancing has raised a variety of employment issues. Some companies have found it necessary to lay off staff. Others have restricted employees from coming to the office if they have traveled recently. When an employee becomes infected, other employees who are aware of this fact may share information with co-workers that could be in violation of privacy laws. When questions arise, your Employment Practices Liability Insurance (EPLI) provider can be a good resource.

In Summary

Below, are some recommendations highlighted throughout the article:

- Please review your insurance policies to determine coverage and submit claims to your insurance company and let Avalon know of the same at claims@avalonrisk.com.
- If you have questions regarding contractual issues, contact your legal counsel to review.
- Review your Workers' compensation policy and ensure all states with active operations are listed in section 3A and that all states (other than ND, OH, WA, WY which are monopolistic) are listed in 3C section of the policy.
- Importers may, in narrow circumstances, request additional days to pay their duties, taxes, and fees to CBP. If they receive approval, please forward a copy of the approval to our Bond Underwriting department at bondunderwriting@avalonrisk.com.
- When a vendor or agent asks you to re-direct payments to a new account, routing number, etc., be vigilant in verifying that the requestor is who they purport to be.
- Make certain that employees follow protocols established by your IT professionals.
- Review your Crime and Cyber policies to make sure they are up to date.

As we deal with this unprecedented health crisis, remember that insurance is one of a variety of ways to manage your risk. We would encourage clients to review the [guidance](#) that the CDC has issued for employers to follow as we all navigate through these difficult times for our country. Avalon wants to assure you that we are here to help you. Like many of you, we have activated our business continuity plan and employees are working from home. Your Avalon representatives are available by phone and email.

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