



# COVID-19 & Your Commercial Insurance Program

## *Considerations for Your Changing Operations*

Over the past several weeks our commercial clients have been asking us questions regarding COVID-19's impacts on their insurance programs. For almost all of you, the Coronavirus Pandemic has changed the operations and structure of your business, and these changes to your business undoubtedly will impact your insurance program.

We understand that you have concern over several fronts: some of you have reduced or suspended operations, others have started work from home programs, several of you are changing the products they manufacture for the first time, and many of you understandably want to know the exposures they face by reopening their doors to the public.

The Risk Advisors at Scott want to equip you for this new landscape. In order to do so, we are actively researching individual policies, paying close attention to trade publications, and sharing information regarding the development of claims. In order to provide you with the most current information, we have we have compiled answers to some of the most relevant and timely questions below:

## **GENERAL LIABILITY**

### ***Will my insurance policy respond to a customer's allegation that my company is responsible for their exposure to COVID-19?***

- Customers, visitors, and/or residents who have contracted coronavirus are filing lawsuits against businesses; these suits contain allegations that a specific business neglected to protect them from exposure to COVID-19. Although you are taking as many precautions as possible to keep the virus out of your location and products, customers may nonetheless file a lawsuit claiming that your business caused their exposure.
- A Commercial General Liability policy provides coverage for claims bodily injury or property damage arising out of that insured's negligence or alleged negligence, so it may respond to such an allegation. Note that the policy not only pays any necessary indemnity payment to customers or clients if your business found to be negligent, but it also provides defense costs for these lawsuits.
- In order to prevail, your customer would have to show a direct, causal, link proving your organization – and not any others - exposed them to COVID-19. The determination of whether your business will be found responsible for infections will likely be subject to case law and will be interpreted differently in each state/jurisdiction.
- Be aware that a minority of liability policies have an exclusion for communicable or infectious disease; if your policy has this exclusion, it will not provide any coverage or defense.

### ***We are now making Medical Supplies: Are My New Products Covered?***

- In order to provide much-needed help to patients and healthcare workers, and to maintain operations, many of you have begun manufacturing masks, ventilators, or other medical devices. If you are starting

to manufacture medical devices, please notify your general liability policy's agent to confirm the policy will provide product liability coverage. Carriers will likely ask additional underwriting questions. This notification is especially important for companies who do not normally build and manufacture products for the healthcare industry.

- Through the PREP (Public Readiness and Emergency Preparedness) Act, you may have some immunity from liability, but the PREP act does not cover all devices; furthermore, many insurance carriers do not have the ability to provide product liability insurance for all medical products. Therefore, contact your Scott Risk advisor in order to confirm that the general liability insurer will provide product liability coverage.

## **WORKERS' COMPENSATION**

### ***Will workers' compensation cover an employee who contracts coronavirus?***

- In most states, workplace exposure by itself will generally not meet the threshold of compensability; instead, an inherent employment risk must cause exposure, such as an epidemiologist working with the virus. In general, coverage applies if the employee can prove the exposure arose out of employment and was in the course and scope of their work.
- Applicability of coverage depends on how each state treats disease or occupational disease. However, some states like California are beginning to cover COVID-19 Workers' Compensation claims in a manner unlike previous occupational disease claims.
- The National Council on Compensation Insurance (NCCI), which sets rules for Workers' Compensation rating and Experience Modifications for most states, has also proposed to exclude COVID-19 claims from experience rating. They plan to treat them like earthquake or terrorism events, which are rare, catastrophic, and not predictable. Therefore, if an employee has a compensable COVID-19 injury claim, NCCI plans to exclude it from the experience mod rating sheets.

### ***How will my audit be impacted by furloughs, employees working from home, and hazard pay?***

- NCCI has proposed filings that will exclude payroll for employees that are not working but are still being paid on workers' compensation audits. This change would not apply to employees working from home, rather employees receiving salary continuation even though they are not working (e.g., under the Paycheck Protection Program). We anticipate that non-NCCI states will do the same.
- If your business has implemented a work from home plan, we recommend you separate payroll by the days your employees are working from home from the days your employees are working in the office. At the time of the workers compensation audit, the work from home classification will likely be different from the employee's normal (onsite) payroll classification.
- Many of you are now paying employees who are essential workers at a higher hourly rate than you had paid them before the coronavirus pandemic. NCCI does not plan to discount these wages, so you should treat any increased pay as for "hazard pay" the same as normal wages.

## **PROPERTY**

### ***Will my property policy pay for business interruption due to a shutdown?***

- Business Interruption insurance is designed to provide income protection as a result of physical damage under a covered cause of loss to an insured property. Most Property policies are on a “Special cause of loss” form. That means that all causes of loss (like fire, theft, tornadoes), except those specifically excluded, are covered.
- As a result, business owners must meet two standards in order for coverage to apply:
  - 1) Is a virus covered as a cause of loss?
  - 2) Does the presence of a virus constitute “physical damage” to the location?
- For those businesses who have filed a claim, the majority of insurance carriers have been issuing denials. Most property policies contain a virus exclusion, so COVID-19 is not a covered cause of loss. In addition, they argue that the presence of a virus does NOT constitute physical damage.
- However, policyholders have already begun filing suits to challenge the industry response. In addition, some states have begun to file pending legislation that may address this issue more definitively. The suits will be litigated and will likely take years to obtain a decision; these decisions will vary by state and jurisdiction.
- A future insurance solution for pandemics may be on the horizon, though: Congress is considering creating a Federal insurance backstop for future pandemics (similar to the Terrorism Risk Insurance Act – TRIA – that was put in place for terrorism-related events after the September 11 attacks).

### ***Will my property insurance cover a loss if my building is vacant due to shutdowns?***

- Most insurance property policies have a provision known as a “vacancy clause”. If at least 31% of your location is not in operation for over 60 days, your coverage can be significantly eroded, or in some cases, not in effect at all.
- Some insurance companies have told us that they are taking a softer stance on vacancy due to COVID-19. However, we have noticed that these carriers are putting some stipulations on their position; for example, one carrier will waive the vacancy provision for a business that closes “solely” due to “governmental orders.” For example, a warehouse or restaurant that is shut down due to lack of business would not meet the standard of the insurance carrier’s vacancy waiver.
- Furthermore, some property insurance policies have a little-known limitation called a “protective safeguard” endorsement. This endorsement requires that all “protective safeguards” – burglar alarms, fire alarms, sprinklers, (or other devices) must be operational. If these are not operational and you have not notified the insurance company, the policy will not cover property damage.
- If you are experiencing a shutdown that you anticipate will last 60 days or more, or if your policy has a protective safeguard limitation, please notify your Scott Risk Advisor.

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Our Scott Risk Advisors are willing to discuss in more detail any of the above questions, especially as they pertain to your own business. We are also able to talk with you regarding how new insurance coverage decisions, litigation, and COVID-19-related legislation may impact your program.

Please visit our [\*\*COVID-19 Resource Page\*\*](#) for updates and contact a Scott Risk Advisor today to discuss your specific concerns.