Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

A Guide To Insurance Protections As Businesses Reopen

By **Seth Tucker, Deanna Wilcox and Jad Khazem** (September 4, 2020, 4:26 PM EDT)

Seth Tucker

Deanna Wilcox

Jad Khazem

As it became clear in March that the novel coronavirus would substantially disrupt American life, the challenge facing many businesses was their abrupt closure, which brought about drastic if not total drops in revenue.

Following those closures, many businesses turned to their insurers and pursued coverage for business interruption. By early August, approximately 1,000 coronavirus-related coverage lawsuits had been filed against insurers under first-party property and business interruption policies.[1]

The next challenge facing many businesses — and schools, universities, houses of worship and nonprofits — is reopening.

Businesses and nonprofits of all types will confront the same fundamental questions: What if our workers contract COVID-19 when they return to the office, the factory floor or the classroom? What if visitors to our business, such as vendors or customers, contract the virus and allege that they were exposed while on our premises? And what if the tensions caused by the pandemic engender disputes between us and our employees over such issues as leave, promotions, hours and the like?

Fortunately, the insurance policies that many companies and nonprofits already have should provide substantial protection against risks such as these.

This article considers this next wave of insurance issues of greatest concern to companies and other organizations, and addresses policyholders' rights under third-party coverages, including workers' compensation and employers liability policies, employment practices liability insurance and general liability insurance.

Although coverage in any given instance will depend on specific policy language and the facts of the claim, generally speaking, each of these coverages affords important protection for policyholders — from protecting employees and their families, to reducing businesses' exposure for liability over employment disputes, to safeguarding against claims by business invitees.

Workers' Compensation and Employers Liability Insurance

As employers around the U.S. reopen or move through various phases of back-to-work plans, many understand that, despite precautions, there is some unavoidable risk of infection to their employees as they return to office buildings, factory floors, restaurants and other workplaces. Workers' compensation and employer's liability insurance can provide important protection both for workers and the companies that employ them, although details remain to be worked out in the courts.

Claims are fast multiplying against employers by employees who contracted the virus after returning to work. At the end of July, the Wall Street Journal reported an emerging first wave of lawsuits against major employers over wrongful deaths associated with alleged workplace coronavirus exposure.[2] Such developments put to the test the rights of employers and their families to recover under workers' compensation and employer's liability insurance.

For background, state law generally bars employees from suing their employers for damages due to injury sustained on the job or for employment-related illnesses, and instead requires employers to afford workers' compensation benefits set by statute for injured employees. Such benefits are usually an exclusive remedy, and are available irrespective of employer fault.

In some cases, however, and depending on state law, an employer may be liable for tort damages instead of workers' compensation benefits — as where an employee alleges egregious acts that exceed the compensation bargain,[3] or where an employee's family members sue for losses distinct from those suffered by the employee.[4]

Moreover, if an illness is not demonstrated to be particularized to the employee's profession or workplace, it may not be compensable by workers' compensation. A number of states have enacted or are considering measures that would put in place the rebuttable presumption that workers' compensation covers certain workers, such as first responders, front-line health care workers or employees classified as essential workers, who fall ill due to COVID-19.[5]

Workers' compensation and employer's liability insurance is designed to cover an employer's obligations to employees who sustain bodily injury by accident or disease on the job. Typical policy language provides that for the workers' compensation or employer's liability coverage to apply to bodily injury by disease, that injury must have been caused or aggravated by the conditions of the insured company's employment.

The workers' compensation part obligates the insurer to pay whatever benefits an injured worker is entitled to receive under state workers' compensation law, and so the coverage varies from state to state. The employer's liability part covers employer liability for work-related injury or disease but excludes amounts payable as workers' compensation benefits; in other words, it is designed to respond in cases where workers' compensation benefits are not available due to statutory limitations or where the exclusive remedy rule does not apply.

The employer's liability part also covers damages, where permitted by law, for consequential bodily injury to a spouse, child, sibling or parent of an injured employee if these damages are the direct consequence of the employee's covered injury, a coverage grant that may prove valuable in light of the high contagiousness of COVID-19. Both coverage parts require the insurer to defend claims by employees seeking statutory benefits or damages from the employer.

Recently filed complaints reveal an array of potential coronavirus-related liability theories against employers, including: (1) failure to provide a safe workplace; (2) failure to furnish personal protective

equipment and implement social distancing; (3) failure to sanitize areas; (4) failure to test and quarantine employees, and more.[6]

Employers facing such claims will likely try to redirect the claims into the workers' compensation system, where benefits payable to successful claimants are capped by statute and covered by workers' compensation insurance. One hurdle that employee claimants will encounter in seeking workers' compensation benefits is the requirement that illness be particularized to the workplace, which is complicated by the novel coronavirus' ubiquity.

Presumably at least some claims especially in the health care field will end up meeting the particularization requirement, but others may not, meaning the claims will not be compensable. This hurdle, as well as the statutory cap on benefits, may lead some claimants to try to overcome the exclusive remedy rule and recover in tort by, for example, asserting gross negligence or worse.[7] Although the viability of these and similar claims remains uncertain, workers' compensation and employer's liability policies can help immensely by at least covering the cost of defending nonmeritorious claims.

Workers' compensation and employer's liability insurers may try to sidestep their obligations for such claims by pointing to one or more policy provisions, including: (1) exclusions for intentional or willful misconduct, (2) workers' compensation exclusions for noncompliance with health/safety regulations, and (3) employer's liability exclusions for damages arising out of "personnel practices, policies, acts or omissions."

But policyholders have ready responses to each. As to the first type of exclusion, so long as there is any possibility of a covered liability not within such an exclusion such as one based on reckless conduct by the employer, the insurer should have to fund the defense of the lawsuit. The indemnity protection of an employer's liability policy is likely to remain available because responsible employers generally are unlikely to trigger such an exclusion, and the continuing uncertainties surrounding the virus militate against a finding that even less-than-meticulous employers engaged in intentional misconduct.

To prevail on the second exclusion an insurer must bear the burden of proving that the employer violated health/safety regulations and that the violation caused the complained-of injury — no simple task where, as can often be the case, the relevant regulations are discretionary and their connection to the alleged injury is not readily apparent or cannot be established.

Finally, although an insurer might cite the personnel practices exclusion to deny claims that rest on, for example, supposed inadequacies with an employer's social distancing or work-from-home policies, courts have limited the application of such exclusions to personnel management matters such as "hiring and firing, promotion and demotion, wages paid and hours worked."[8] On this understanding of the relevant policy language, employee coronavirus injury claims would not be barred.

Employment Practices Liability Insurance

The pandemic is straining ordinary employer-employee relations, prompting disputes that otherwise might not have existed over issues such as leave policies, work-from-home policies and health accommodations. As one major broker put it: "In unprecedented fashion, all of these issues are arising at once and with urgency."[9]

Some employees have filed lawsuits alleging that their employers discriminated or retaliated against

them for taking leave, working outside the office, or contracting COVID-19. Still others have alleged that the pandemic has been used as a pretext to justify terminations that were secretly driven by a desire to discriminate on the basis of sex, disability or other protected grounds.

According to a recent survey of employee-initiated litigation, dozens of coronavirus-related class actions have been filed against employers during the pandemic.[10] Employment practices liability insurance will be a key source of relief for these and similar claims.

Employment practices liability insurance generally covers claims for wrongful termination, retaliation and discrimination, providing important protection that is different from workers' compensation and employer's liability insurance's protection for bodily injury claims. Although employment practices liability insurance policies may purport to exclude coverage for claims sounding in Family and Medical Leave Act or Occupational Safety and Health Act violations (think medical leave claims or workplace safety claims), those policies usually restore coverage for claims alleging retaliation against employees for having exercised rights under those acts.

Under that carve-back, a dispute over, for example, termination for refusal to come to an allegedly unsafe workplace could well be covered. Similarly, while employment practices liability insurance policies often exclude coverage for bodily injury claims, many employment practices liability insurance policies preserve coverage for emotional distress or mental anguish claims, an exception that may very well apply during this pandemic.

Coverage for wage-and-hour claims — which may spike as business hours become less fixed, at least for remote workers — is policy-specific, but typical policy terms range from full exclusions to limited or full coverage. Employment practices liability insurance policies generally pay for damages awards, settlements and defense costs for covered claims, but they usually do not cover fines, penalties or injunctive relief such as reinstatement although front and back pay are typically covered.[11]

General Liability Insurance

Particularly as we enter the reopening phase, businesses and organizations that welcome guests to their premises — from restaurants, hotels, shops and salons to any entity with an office that a vendor, client or business partner visits — face a real risk of being sued if their invitees test positive for COVID-19 after visiting the premises.

General liability policies, which cover claims by third parties seeking damages for bodily injury, should in principle cover and provide a defense for such suits. Note that general liability policies typically exclude claims for injury to employees because such claims are intended to be covered by workers' compensation and employer's liability policies.

A suit alleging, for example, that the claimant contracted the virus on restaurant premises because the restaurant failed to sanitize table surfaces or post social distancing markers should not, from a coverage perspective, differ materially from an ordinary slip-and-fall claim alleging premises injury because the restaurant failed to clean up a spill or remove ice from a sidewalk. Moreover, general liability policies do not typically have an exclusion for viruses.

Insurers may nevertheless resist acknowledging general liability coverage. Depending on the claim and the specifics of the policy, general liability insurers may, for example, attempt to (1) dispute whether bodily injury was sufficiently alleged, (2) argue that recovery is barred by an expected or intended

exclusion, or (3) argue that recovery is barred by a pollution exclusion.

On this first issue, there can be little doubt that a claimant alleging that she actually contracted COVID-19 has alleged bodily injury, particularly because policies often define "bodily injury" to include "sickness, disease or death." Insurers may argue, however, that an allegation of emotional distress arising from fear of potential exposure to the virus, as many cruise line passengers alleged in a recent class action, does not constitute an allegation of bodily injury.[12]

Many, though not all, courts will treat allegations of emotional distress accompanied by physical manifestations such as headaches, insomnia, weight loss or nausea as sounding in bodily injury.[13]

An insurer argument that a claimant's COVID-19 injury was expected or intended is, in the ordinary case, unlikely to prevail. Courts across the country typically set the bar quite high for an insurer seeking to escape coverage based on this defense, interpreting the clause to require the insurer to prove that the insured subjectively wanted to inflict the injury or understood that injury was virtually sure to follow from its conduct.

That an insured knew of a risk, as distinct from a near certainty of injury, usually comes nowhere close to establishing coverage-defeating expectation or intent. Such an unwarranted expansion of the exclusion would largely defeat the purpose of purchasing general liability coverage in order to insure against risks.

To the contrary, courts routinely uphold coverage when the policyholder has been found grossly negligent or reckless, and have affirmed coverage even when the policyholder's conduct resulted in transmission of a communicable virus.[14] In light of the heavy burden an insurer bears when asserting that injury was expected or intended by its policyholder, any attempt to avoid coverage on this basis should be greeted with great skepticism.

Finally, many general liability policies contain an exclusion for bodily injury arising out of the "discharge, dispersal, release or escape of pollutants," including "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste materials."

Although insurers may try to avoid coverage by relying on such an exclusion, the weight of precedent and rules of construction militate against them succeeding. Many, though not all, cases have limited the reach of pollution exclusions to traditional environmental pollution,[15] and the spread of the novel coronavirus does not fit that bill.

As the California Court of Appeal's Fourth Appellate District observed in Johnson v. Clarendon National Insurance Co.: "Does a policyholder pollute the environment by sneezing and passing a virus to their neighbor? A layperson would not reasonably interpret the exclusionary language to apply to th[at] scenario[]."[16]

Moreover, exclusions for viruses are fairly common in property policies and became widespread in the mid-2000s after the 2003 SARS epidemic, but insurers for the most part have not, at least to date, included virus exclusion in their general liability policies. That the insurance industry was aware of this risk and chose not to exclude it gives policyholders a powerful argument against any reading of the pollution exclusion that would sweep in viruses such as the novel coronavirus.

Conclusion

As businesses and nonprofits reopen while the pandemic rages on, these organizations, their employees and their customers will all be called upon to adapt to changed and evolving circumstances. Continued friction — and litigation — are likely if not inevitable.

Liability insurance addressing core business risks should provide an important level of protection and relief. Businesses and nonprofits should take reasonable precautions against the transmission of the virus as part of their overall risk-management strategy, but liability insurance can provide another important prong of that strategy.

Seth Tucker is a partner, Deanna Wilcox is special counsel and Jad Khazem is an associate at Covington & Burling LLP.

Ralph Muoio, special counsel at the firm, contributed to this article.

[1] Covid Coverage Litigation Tracker, University of Pennsylvania Carey Law School (as of August 3, 2020), https://cclt.law.upenn.edu/ (accessed August 27, 2020).

[2] Janet Adamy, Families File First Wave of Covid-19 Lawsuits Against Companies Over Worker Deaths, The Wall Street Journal (July 30, 2020), https://www.wsj.com/articles/families-file-first-wave-of-covid-19-lawsuits-against-companies-over-worker-deaths-11596137454 (accessed August 4, 2020).

[3] See, e.g., Fermino v. Fedco, Inc., 872 P.2d 559, 560 (Cal. 1994) (exclusivity rule does not bar false imprisonment suit "because an employer that falsely imprisons its employee has stepped outside its proper role" and resulting injury exceeds scope of the "compensation bargain").

[4] See, e.g., Raney v. Walter O. Moss Reg'l Hosp., 629 So. 2d 485 (La. App. 1993) (exclusivity rule did not bar suit by worker's family members seeking to recover for hepatitis exposure from worker infected at workplace).

[5] See, e.g., Cal. Gov. Newsom, Exec. Order N-62-20 (May 6, 2020); Ill. Public Act 101-0633 (June 5, 2020); N.J. Senate Bill 2380 (passed by both houses on July 30, 2020 and sent to Governor Phil Murphy for final consideration); State Activity: COVID-19 WC Compensability Presumptions, National Council on Compensation Insurance (as of August 18, 2020) https://www.ncci.com/Articles/Documents/II_Covid-19-Presumptions.pdf (accessed August 26, 2020).

[6] See, e.g., Class Action Complaint, Esco v. Dollar Tree Stores, Inc., (No. 2020-00280479, Super. Ct., Cal.), filed on June 10, 2020; Complaint at Law, Evans v. Walmart, Inc., et al., (No. 2020 L 003938, Cir. Ct., Ill.), filed on April 6, 2020.

[7] See, e.g., Tex. Labor §408.001(b) (exclusivity rule "does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by ... the employer's gross negligence").

[8] Lawson v. Straus, 673 So. 2d 223, 227 (La. App. 1996), cited with approval in Zurich Ins. Co. v. Smart & Final Inc., 996 F. Supp. 979, 988 (C.D. Cal. 1998).

[9] Natalie Douglass, COVID-19 and Employment Practices Liability Insurance, Arthur J. Gallagher & Co. (2020), https://www.ajg.com/us/news-and-insights/2020/mar/employment-practices-liability-insurance-and-coronavirus-covid-19/ (accessed August 26, 2020).

[10] Louise Esola, COVID workplace suits increase: Report, Business Insurance (July 7, 2020), https://www.businessinsurance.com/article/20200707/NEWS08/912335501/COVID-19-coronavirus-pandemic-workplace-lawsuits-increasing-report-Fisher-Philli (accessed August 26, 2020).

[11] Stephanie D. Gironda & Kimberly W. Geisler, Employment Practices Liability Insurance: A Guide to Policy Provisions and Challenging Issues for Insureds and Plaintiffs, 33 ABA J. LAB. & EMP. L. 55, 57-58 (2017).

[12] Second Amended Complaint, Archer v. Carnival Corp. & PLC, et al., (No. 2:20-cv-04203, C.D. Cal.), filed on August 14, 2020.

[13] See, e.g., Voorhees v. Preferred Mut. Ins. Co. , 607 A.2d 1255, 1261-62 (N.J. 1992).

[14] See, e.g., Worcester Ins. Co. v. Fells Acres Day School, Inc., 558 N.E.2d 958, 970 (Mass. 1990) ("Generally, injuries resulting from reckless conduct do not fall into the category of 'expected or intended' injuries ...."); Philadelphia Indem. Ins. Co. v. Stebbins Five Cos. , 2004 WL 210636, at *4 (N.D. Tex. Jan. 27, 2004) ("[A]n expected or intended injury exclusion in an insurance policy does not exclude coverage for grossly negligent conduct."); Loveridge v. Chartier, 468 N.W.2d 146, 156 (Wis. 1991) ("[E]ven if a jury could reasonably conclude, based on the evidence in the record, that [the policyholder, who was insured under a homeowner's policy] knew there was some risk of giving [a minor] the herpes virus, that is insufficient to bar insurance coverage under the intentional-acts exclusion.").

[15] MacKinnon v. Truck Ins. Exch., 73 P.3d 1205, 1211, 1216 (Cal. 2003).

[16] Johnson v. Clarendon Nat. Ins. Co., 2009 WL 252619, at *12 (Cal. App. Feb. 4, 2009) (unpub.).