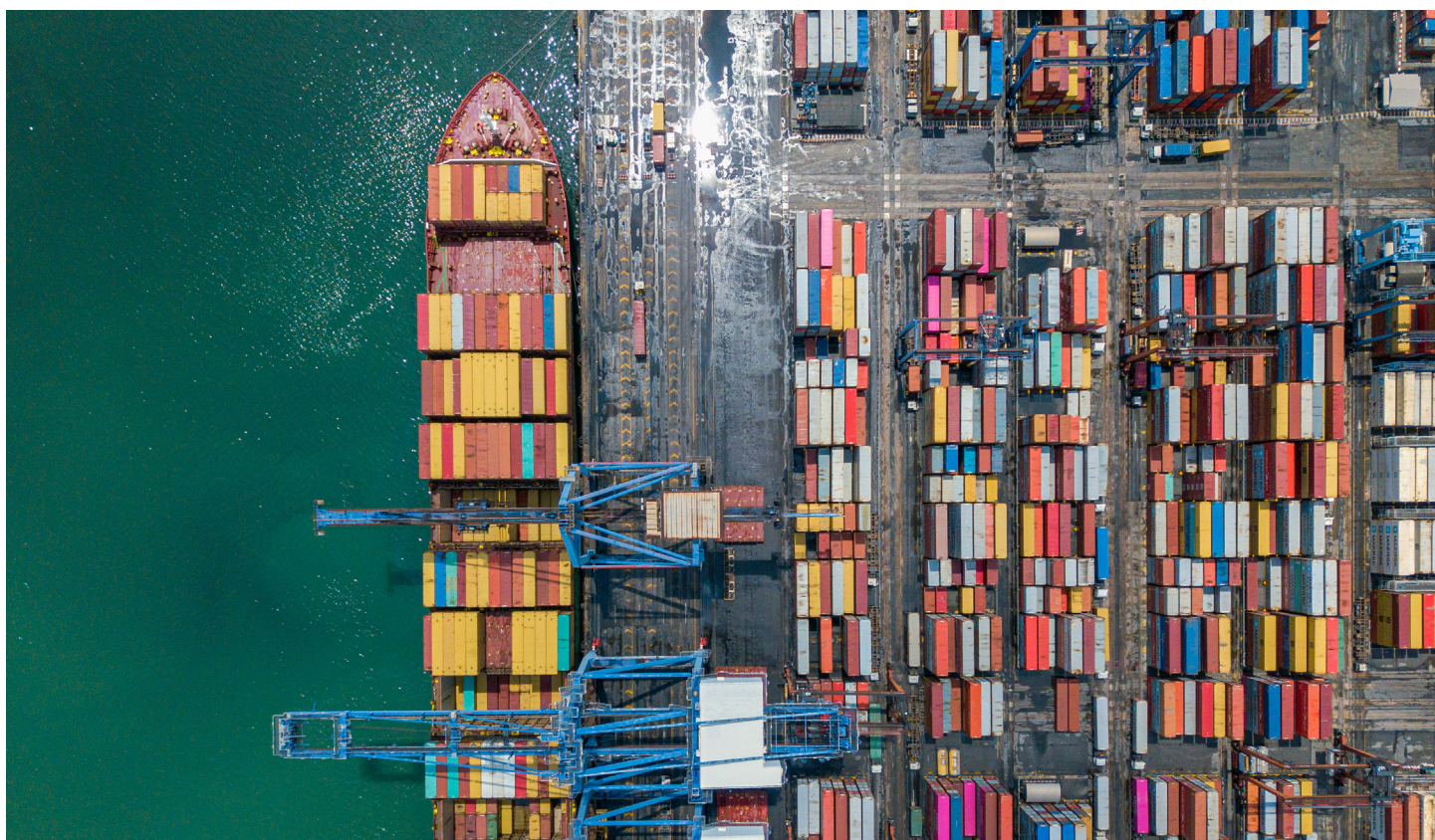


# Coronavirus Insurance Coverage and Claims Guidance

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April 15, 2020



With the exposure of the coronavirus (COVID-19) increasing, organizations are evaluating the potential coverage which may be triggered from their insurance policies. Actual loss situations and a review of individual policy forms will be a crucial step to properly evaluate potential available coverage application. Insurance carriers have the ultimate authority in determining coverage for presented claims. Any suspected COVID-19 related losses should be reported per the policy guidelines. Policyholders should be aware that some policies may require specific time frames from notice of potential claim, such as 48 hours. This document provides factors that will be examined in the event losses related to COVID-19 occur.

# Workers' compensation

Each injured employee situation will be evaluated on its own individual merits. Workers' compensation insurance covers employees who suffer injury or illness "arising out of or in the course of their employment." Many factors will need to be considered if presented COVID-19-type claims are work related. These include but are not limited to:

- The timing of when the loss occurs: were there reports of previously infected individuals made in this same time period?
- The location(s) where the injured worker was present leading up to the injury or exposure: was the injured worker within an area where exposure of the virus was present or carried a greater risk?
- The activities the injured worker was engaged in leading up to when the loss or exposure took place: was the individual in contact with others or working remotely?
- The specific nature of the loss: what further details can be uncovered to provide greater clarity around exposure to the virus as an occupational disease?

In most jurisdictions, individuals seeking benefits under workers' compensation will also need to meet the burden that the coronavirus illness arose out of, or was caused by, conditions "peculiar" to the work. In other words, there is arguably a difference between a healthcare worker and the backroom office staff potentially being exposed to COVID-19. It is likely that coronavirus and the particular characteristics of a specific occupation may be a large part of the evaluation process of compensability. For example, black lung disease is a "peculiar" condition for coal or mine workers due to the higher-than-average presence of dust. It is possible certain occupations may have conditions in which COVID-19 exposure may be higher.

# Employers' liability coverage

This coverage part, also referred to as part two of the workers' compensation policy, provides protection for the insured employers' liability of employees work-related bodily injury or disease, other than liability imposed by a state's workers' compensation law.

With COVID-19 exposures, negligence outside of the liability of a jurisdiction's worker's compensation law may include:

- The employer had a legal duty to protect the employee from any undue harm or injury: as an example, did the healthcare employer provide personal protective equipment (PPE) to its workers?
- The employer's actions or omissions violated that duty: such as was the PPE required by OSHA?
- An employee was injured as a direct result of his employer's violation of this duty: the worker was exposed to COVID-19 as a direct result of not being provided PPE.
- The exposed worker suffered damages due to their illness caused by COVID-19.

Claims under the employer liability coverage generally center around four types.

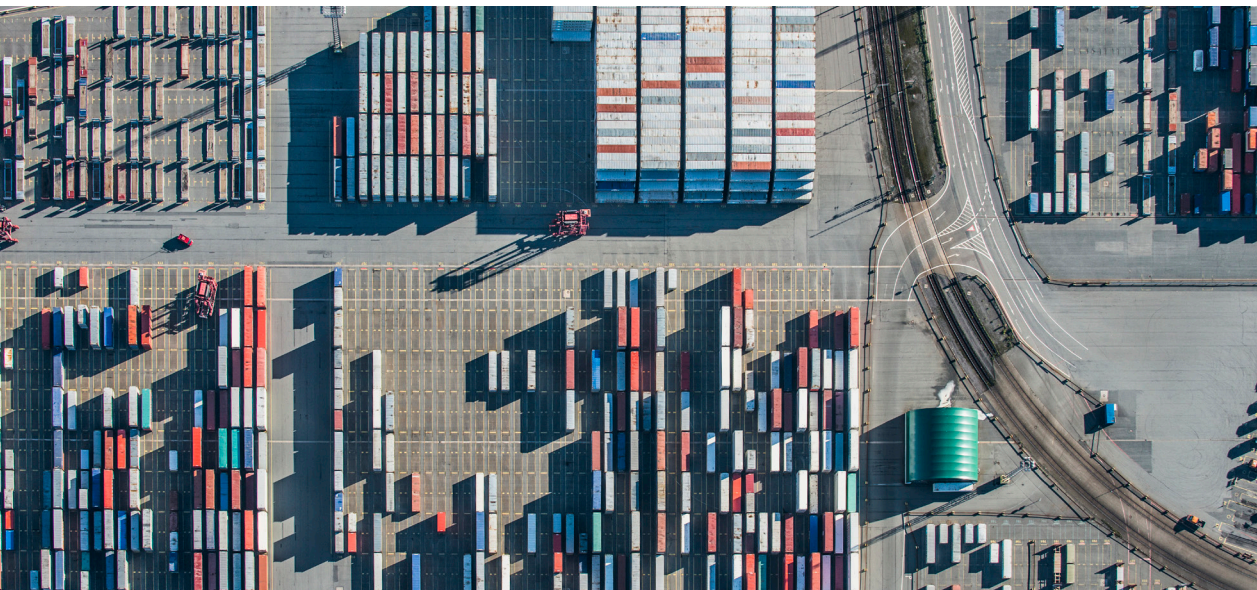
1. Third party over actions: a worker exposed to COVID-19 files a claim against the building owner, who in turn makes a third-party claim against the worker's employer, based upon a direct tort claim or contractual obligation.
2. Dual capacity claims: using our previous example, an injured worker contends their PPE, which is also manufactured by their employer, is defective resulting in an exposure to COVID-19. The employee can seek a claim against their employer contending it is liable as both the employer and the manufacturer.
3. Loss of consortium: a claim made by the spouse of an injured worker for loss of services.
4. Consequential bodily injury: allegations by a family member that they were also exposed to the coronavirus from the employee's illness and work-related exposure.



# Commercial general liability insurance

Alleged legal liability to organizations, including, but not limited to, negligence or contractual liability, may fall under a commercial general liability insurance. Careful review will need to be made to determine if an “occurrence” falls within the policy’s identified damage requirements and are outside of any potential coverage exclusions. Carriers may raise exclusions such as:

- “Intentional Acts:” raising that the policyholder knew of the danger or prior exposures of the coronavirus.
- “Pollution:” although unlikely, losses related to COVID-19 fall within the pollution exclusion.



# Environmental or pollution policies

Under coverage for a pollution policy, it will first need to be evaluated if the coronavirus meets the definition of a “pollutant.” Certain policy forms will include definitions which may meet the characteristics of the coronavirus. Exclusionary language will then need to be examined within the policy to determine if it includes limitations for viruses or human contact spread exposures.

Potentially meeting these policy requirements may then trigger coverage for “discharge, dispersal, release or escape of” the covered “pollutant.” It is expected the typical loss will center around pollution clean up, or specifically to COVID-19, the disinfection and decontamination of a covered location.

Further policy language may require or limit these costs by requiring the cleanup be completed by order of a local, state or federal agency, or notice of discovery be provided to these entities within a stated time frame.





# Property coverage

Finally, for first-party property policies, it is expected the inability to sustain business operations resulting in loss (or lost) revenue may be claimed. These would include business interruption or civil authority situations.

Under most loss scenarios, the policy may state that physical damage occurs as a requirement to coverage, as well as to policy extensions such as business interruption. The policy may also specifically exclude or restrict damages related to pandemic disease. A careful review of an organization's individual policy will need to be reviewed on these factors.



# Force Majeure

Do circumstances arising from COVID-19 trigger the Force Majeure clause in contracts?

Force Majeure clauses often specify the particular events that constitute a “force majeure” which would serve to excuse a party’s performance under the contract (e.g., pandemic, disease, epidemic, or quarantine) as long as the qualifying events exists.

In the event the clause does not contain any specific language around pandemics, the law of the jurisdiction that governs the contract will apply and should be checked for interpretation and application of force majeure clauses. Many jurisdiction/courts construe these clauses narrowly.

Courts will evaluate application of force majeure by judging foresee-ability and the impossibility of complying with the contractual terms as opposed to conditions which merely render contract duties prohibitively difficult to perform. Companies will need to be proactive in reviewing their contracts to identify applicability of force majeure and what notice and reporting obligations around force majeure may be required.

For more detail on force majeure and strategies companies can follow, [click here](#).





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