

COVID-19 Lawsuits Could Lead to Wave of Insurance Claims

As shelter-in-place orders begin to ease and businesses reopen, companies should be prepared for a potential wave of lawsuits from customers and employees who may claim to have contracted COVID-19 on their premises. In response, Congress is currently considering [legislation](#) to shield companies from liability provided that they follow federal and state healthcare guidelines, which could help curtail the ability of plaintiffs to bring COVID-19 related lawsuits. In the meantime, companies should carefully review their insurance policies to see what coverage might be available for such claims.

Currently, most of the insurance focus relating to COVID-19 has been on [business interruption](#) and [event cancellation](#) coverage. However, these policies do not typically provide coverage for losses arising from third-party lawsuits. For most third-party lawsuits, companies should be looking to their general liability, professional liability or directors and officers (D&O) insurance. With respect to employee illness and any related claims, workers' compensation, employers' liability and employment practices liability insurance (EPLI) are the more likely sources of coverage.

Third-Party Lawsuits

General Liability Insurance

A company should look first to its general liability policies to cover any lawsuits brought by customers who claim to have contracted COVID-19 and allege that the company negligently exposed them to the virus. Barring any applicable exclusions, general liability insurance protects businesses from a broad range of third-party liability risks, including lawsuits from customers who suffer bodily injury on the company's premises or due to the company's negligence. These policies usually include a duty by the insurer to defend the insured in any such lawsuit and would cover the defense costs as well as the damages arising from the lawsuit.

Professional Liability Insurance

Professional liability, also known as errors & omissions insurance, provides coverage for professionals in lawsuits where the plaintiffs allege the defendant breached a professional standard of care. For example, nursing homes are already facing numerous [lawsuits](#) alleging that they negligently failed to implement appropriate safeguards or apply the appropriate standard of care to protect their residents from COVID-19. In addition to nursing homes, hospitals, healthcare workers and other health organizations could all face similar lawsuits from their patients for negligently failing to protect them and/or treat them appropriately for COVID-19. Specialized professional liability policies, such as medical malpractice insurance, could also provide coverage for these types of lawsuits.

D&O Insurance

D&O insurance provides a wide array of coverage for third party claims made against individual directors and officers, as well as the company itself, for business judgment decisions. D&O insurance covers "Loss" due to "Claims" against an "Insured" alleging a "Wrongful Act." While entity coverage for public companies is limited to securities claims (for example, direct and derivative claims and class actions alleging violations of securities laws), private companies have broad entity coverage that would likely be triggered by negligence-based claims involving COVID-19 (for example, negligence in risk mitigation, preparedness and response to COVID-19). D&O policies may also extend to government investigations and inquiries, depending on the wording of the policy, which could provide coverage for SEC investigations and claims under the False Claims Act, which we expect to stem from COVID-19.

While D&O policies can have broad coverage grants, especially with regard to insured individuals and private companies, exclusions and other limitations of coverage must be read carefully. With regard to COVID-19, particular attention must be paid to the wording of the bodily injury exclusion. D&O policies typically exclude coverage for bodily injury, including disease, as this is more typically covered by general liability insurance. Still, D&O insurance could provide coverage for certain lawsuits, including claims of

negligence in developing and implementing appropriate COVID-19 guidelines and procedures, although there may not be coverage under a D&O policy for the resulting bodily injury. Bodily injury exclusions differ based on the policy form, but either exclude losses “for” or “arising out of” bodily injury, sickness, disease and death. The latter “arising out of” language may be problematic for COVID-19 related losses, as insurers will likely (aggressively) argue that the bodily injury exclusion broadly precludes coverage for any COVID-19 related losses where someone has been injured.

Still, D&O insurance remains valuable with respect to shareholder class action lawsuits alleging that a company failed to disclose material risks presented by COVID-19 in their securities filings. For example, shareholders have already filed a [securities class action](#) against Norwegian Cruise Line, alleging that the company misled investors with respect to the impact of COVID-19 on its business. Also, a pharmaceutical company is facing a derivative lawsuit concerning alleged misleading statements made by senior executives regarding the company’s development of a vaccine. D&O insurance is a potential source of coverage for these lawsuits.

Employee Lawsuits

Workers’ Compensation Insurance

In addition to lawsuits brought by customers, many companies are already facing potential lawsuits from their employees. Companies such as a large retailer and meat packing companies are facing wrongful death lawsuits from employees who allegedly contracted COVID-19 at the workplace. Generally, employees who suffer such injuries would be limited to workers’ compensation benefits as states have established workers’ compensation insurance as the “exclusive remedy” for work-related injuries and bar employees from suing their employers directly for such injuries, with certain exceptions. At the moment, it is unclear if workers’ compensation would provide coverage for employees in all instances as for many cases an employee would need to prove a direct connection between the workplace and their illness, which would often be difficult to prove.

Employers’ Liability Insurance

Under most state laws, workers’ compensation may be the only source of recovery for employees who contract COVID-19, limiting the employer’s potential liability. However, many states have some limited exceptions to this “exclusive remedy” rule, including, e.g., lawsuits for intentional injuries, gross negligence in fatal accidents and fraudulent concealment. Companies often have employers’ liability insurance to provide coverage for employee injuries that is in excess of what is covered by workers’ compensation, including the defense costs for any employee lawsuits. In these circumstances, companies should look to their employers’ liability policy for additional protection.

EPLI Insurance

In addition, as employees return to work, employers could face various claims from employees, including, e.g., retaliation for taking leave or asking for a reasonable accommodation to work from home, age and disability discrimination for refusing to accommodate employees who are more at risk for serious complications from COVID-19, discrimination or harassment allegations by Asian American employees, and discrimination or hostile-work environment claims based on COVID-19 diagnosis. These claims may be covered by EPLI, which provides coverage for defense costs and damages arising from various employment-related wrongful acts.

Like D&O insurance, EPLI insurance policies often excludes coverage for bodily injury. As such, under an EPLI policy, the company would not have coverage for injuries suffered by employees as a direct result of contracting the virus. Other common EPLI exclusions that are potentially relevant to COVID-19 related claims include Wage & Hour claims, WARN Act claims, and OSHA & FMLA claims.

General Liability Insurance

General liability insurance also might provide coverage for employee lawsuits brought against third parties, where the third party looks to the employer for contribution or indemnification. For instance, under New York's workers' compensation law, third parties may sue employers for contribution related to an employee who suffered a "grave injury" such as death, permanent loss of use or amputation of a body part, blindness and deafness. Thus, under New York law if an employee contracted COVID-19 and sued the landlord of their employer for failing to adequately clean and sterilize the premises, the landlord would be able to sue the employer for contribution or indemnification if the employee suffered a "grave injury." General liability policies typically contain employer liability exclusions that exclude employee bodily injury lawsuits, but general liability insurance may provide coverage for these third-party lawsuits for contribution or indemnification.

Conclusion

It remains to be seen the kind and type of lawsuits companies will be facing as employees return to work. We will continue writing about these topics in a multi-part series, as we track different claim trends under each type of insurance coverage.