



BUSINESS INSURANCE CONSIDERATIONS FOR NYC SMALL BUSINESS OWNERS

As the business and employment consequences of the COVID-19 outbreak evolve, many small business owners will be assessing damages to and the impact on operations. You will likely have questions about your insurance coverage and the possibility of claims for losses incurred during this crisis. Listed below are the types of potentially relevant coverage often held by small businesses. *****Each insurance policy will contain its own terms and conditions, so be sure to review them carefully, with an attorney if possible.*****

I. COMMERCIAL PROPERTY INSURANCE

Commercial property insurance typically provides coverage for ***physical loss*** or ***damage*** to commercial premises caused by a ***covered event***. ***For small businesses leasing physical space, commercial leases typically require property insurance coverage.*** Ultimately, whether the coronavirus outbreak will be covered under the terms of an individual commercial property insurance policy depends on the language of the policy. Notably, after the outbreak of severe acute respiratory syndrome (SARS) in 2002-2003, many insurance companies inserted exclusions for viral and/or bacterial outbreaks in their insurance policies, which may preclude coverage for losses caused by the COVID-19 pandemic. However, a coverage exclusion only for bacterial outbreaks would not, by itself, preclude coverage for losses caused by the COVID-19 pandemic. ***Thus, a review of your policy's specific language is critical to determining your business' losses caused by the COVID-19 pandemic are covered.***

II. BUSINESS INTERRUPTION INSURANCE

Business interruption insurance may be purchased as a stand-alone policy, but more often, it is part of a business's commercial property insurance. It may provide coverage for lost income, contingent business interruptions, and actions by a civil authority impairing access to the insured premises. Property and business interruption insurance policies typically require physical loss or damage arising from an event covered by (and not specifically excluded from) the policy, either: (1) at the insured property to trigger a covered loss; or (2) at a nearby property, which limits or bars access to the insured premises, and thus triggers additional extensions under the policy (e.g., contingent business interruption or civil authority coverage).

Depending on the language of your commercial property or business interruption insurance policy, the following forms of coverage may cover business losses caused by the COVID-19 pandemic:

1. **Business income coverage** covers losses of income caused by interruption of the business's operation by a covered event causing physical loss or damage to the premises.

Example: A fire causes physical loss or damage to the insured business's property resulting in suspension of the business's operations and losses of income. Business income coverage may cover the lost income.

2. **Contingent business interruption coverage** insures against the risk of indirect loss to the business caused by a covered event causing physical loss or damage to another property.

Example: A fire causes physical loss or damage to a supplier's property and impairs the ability of the supplier to supply items essential to the insured business's operations. Contingent business interruption coverage may cover associated losses.

3. **Civil authority coverage** covers losses caused by an order of a civil authority prohibiting access to the insured premises. Depending on the specific wording of the policy, physical loss or damage may be required.

Example: The Mayor of New York City orders closure of all businesses in an area affected by a hurricane until such time as the area can be made safe for the public. Civil authority coverage may cover associated losses.

4. **Event Cancellation coverage** insures against losses due to the cancellation or postponement of an event.

Example: Inclement severe weather forces the cancellation of an outdoor concert.

Currently, many insurers are issuing coverage denials for claims by business owners for business interruption coverage due to COVID-19, citing a lack of physical loss or damage. Consult with an attorney and your broker to discuss whether you should file a claim.

COVID-19 may lead to changes in policy language going forward as several states' legislators, including NY, have introduced state legislation or asked Congress to pass legislation that would find business interruption coverage under property policies, absent a pandemic exclusion.

III. COMMERCIAL GENERAL LIABILITY & COMMERCIAL UMBRELLA/EXCESS INSURANCE

Commercial General Liability (CGL) insurance insures businesses against claims by third parties for personal injury and/or property damage. Umbrella/excess insurance covers expenses

associated with a claim by a third-party where the general liability insurance policy (and any other relevant policy) is insufficient to satisfy the total amount of the claim.

A key factor regarding a CGL policy's response to a COVID-19 claim is whether there is legal liability. Legal liability exists when: the wrongdoer is found guilty of negligent conduct; the injured party suffers actual harm; and the wrongdoer's conduct was the cause of the harm.

A few examples of actions that could cause legal liability are as follows:

- Allowing an employee who is known to be infected with the virus to continue to work.
- Failure to adhere to required health and prevention guidelines.
- Remaining open in violation of a civil authority order to close.

The likelihood that a business owner may be held liable for injury to a third party claiming to have contracted the virus at the insured's premises is low, as it would be difficult to prove that someone contracted the virus at any one location. However, this will not necessarily stop people from bringing a lawsuit.

IV. WORKERS' COMPENSATION INSURANCE

If an employee contracts COVID-19 while on the job, he or she may be entitled to workers' compensation benefits. In New York, workers' compensation insurance is paid for by an employer and the Workers' Compensation Board, a New York agency, processes claims. New York law requires employers to pay compensation to employees for "accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." New York has recognized that the contraction of an infectious disease can be an accidental injury. Further, Workers' Compensation Law § 21(1) creates a presumption that injuries that occur in the course of employment arose out of that employment and are compensable. Thus, New York courts have found that an employee who contracts an infectious disease while on the job may qualify for workers' compensation benefits.

Nonetheless, employees seeking workers' compensation benefits will be required to show that their employment caused their COVID-19 infection, which may be difficult in light of the widespread presence of the virus.

Example: An employee contracts COVID-19 while attending to customers on behalf of the employer. If the employee can show that the disease was contracted while working for the employer, he or she may be entitled to workers' compensation. However, because of the widespread presence of the coronavirus, the employee may have difficulty establishing that the COVID-19 infection occurred while working.

V. CYBER LIABILITY INSURANCE

Cyber liability insurance covers losses caused by data breaches. Depending on the type of policy and the language within the policy, covered losses may include income losses occurring as a result of a data breach, costs of notifying those affected by a data breach, and costs associated with any claim or lawsuit arising as a result of a data breach. Given that the COVID-19 pandemic has caused many businesses to implement work-from-home policies, there is heightened potential for cyber attacks and data breaches by hackers and phishers. This type of insurance may protect against any losses occurring as a result of such a breach or attack.

Example: An employee working from home clicks on an email link that infects the employee's laptop and compromises a customer's personal data. Cyber liability insurance may cover certain losses resulting from the data breach.

Additional risks and costs include network security liability, privacy liability, security response and forensic costs, data recovery and restoration, ransom event costs, network business interruption, system failure, contingent business insurance, and privacy regulatory defense.

Cyber-related events are likely to be covered by corporate cyber policies, even if an employee is working from home.

VI. EMPLOYMENT PRACTICES LIABILITY INSURANCE

Employment practices liability (EPL) insurance insures businesses against claims by employees that the business has violated their rights. Losses covered by EPL insurance may include costs associated with employees' claims of sexual harassment, discrimination, wrongful termination, etc. EPL insurance may protect a business against allegations of discrimination or harassment by a protected class of employees as a result of HR policies implemented in response to the COVID-19 outbreak.

Example: An employer lays off employees in response to the decreased revenue caused by stay-at-home orders and the closure of non-essential businesses. An employee alleges that the employer discriminated against the employee on the basis of race. EPL insurance may provide coverage for the employer's costs associated with defending against such claims.

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NEXT STEPS: BEST PRACTICES FOR NYC SMALL BUSINESS OWNERS REGARDING BUSINESS INSURANCE

1. REVIEW YOUR POLICY AND IDENTIFY YOUR COVERAGE

- Review your business insurance policies, including any extensions, with an attorney, your broker and claims consultants to better understand the terms and conditions of coverage.
- Review the above types of insurance and compare to the language in the policy or policies to identify your coverage.
- Look for virus exclusions – many insurance companies have explicitly excluded viruses from their covered causes of loss. If your policy has a virus exclusion you may be denied coverage. Consult with an attorney and your broker to get a better understanding of applicable exclusions.

2. DOCUMENTATION AND LOSS TRACKING

- Get a clear understanding of your insurer’s expectations and requirements for the documents needed to submit a claim for a covered loss under your applicable business policies. Some questions to ask insurers should include, but not be limited to:
 - Any requirements to provide details of infected persons or swabs to confirm the presence of the virus on the premises (be mindful of potential breaches to health information privacy regulations).
 - What documentation should be gathered for an insurance claim, including documentation from suppliers who are unable to deliver on their contracts and/or proof of government-mandated closures.
- Quantify losses and keep all invoices, receipts, and purchase orders.
- Keep a detailed log of visitors, which could become useful if the virus is identified on the premises and potential claims arise.
- Identify declining business activity by analyzing variances between expected future revenues and actual revenues.
- Pinpoint and document additional costs incurred from mitigation activities and their effect on profit margins.
- Track unusual costs — for example, cleaning and disinfecting the premises, overtime pay to make up for production losses, and media or communications campaigns to inform the public or employees — separately.
- Capture all potential costs associated with the virus and its business impacts, such as cancelled orders, supply chain breakage, and lost profits, etc. – keep all related receipts, invoices, and purchase orders.
 - Even if these may not ultimately be covered under current insurance programs, they can inform future risk mitigation and management strategies.

3. FILE A CLAIM

- You must provide written notice to your insurer of your intent to file a claim as soon as possible
 - Many insurance policies have language which require that the insured give immediate or prompt notice of a claim. Failure to give timely notice of a claim may result in a denial of coverage.
- Identify any deadlines set by the insurer for the submission of documentation or other required items.

4. MITIGATE DAMAGES

- Many insurance policies require the insured to minimize losses and/or damage, such that if the business can operate at any reasonable capacity it may be necessary to continue to operate.
- For workers' compensation claim mitigation purposes, employers should have policies and procedures in place for prompt identification and isolation of potentially infectious employees; prompt employee reporting of symptoms, illness, and COVID-19 diagnoses; prompt employee notification of potential workplace exposures; and prompt sterilization of any potentially infected areas of the workplace. Sick/symptomatic employees should be encouraged to stay home, and employees concerned about a workplace exposure who wish to seek medical attention should not be discouraged or prevented from doing so.
- Speak with your broker and your insurer about the requirements to mitigate and what actions you will be expected to take.

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The Microenterprise Project Team stands in solidarity with New York City's small businesses, and small businesses everywhere. We remain dedicated to helping small businesses overcome the challenges presented by the COVID-19 pandemic.

If you are in need of immediate legal assistance, contact us via our hotline at (347)-521-5729 or via email at microenterprise@volsprobono.org.