

# MurphyAustin

ATTORNEYS

## Daily Employer Coronavirus Update: Insurance Coverage

**Dear Clients, Friends, and Colleagues,**

Murphy Austin realizes that our clients' first priority is the well-being of their employees and families. This is the eleventh daily update with important information pertaining to COVID-19 in the context of employment law.

Today's update focuses on insurance coverage relevant to an employer. Insurance may play a key role in insulating businesses from labor-related losses, as well as other COVID-19 induced harm.



### Relevant Types of Coverage

#### **Workers Compensation (WC) Insurance**

Employees may pursue WC benefits if they miss work on account of infection. In fact, the [Governor's March 12th Executive Order](#) makes specific reference to WC coverage. Coverage will likely depend on whether the employee contracted the virus during the course of employment. However, many WC policies exclude coverage for diseases to which the general public is exposed. It is also unclear how COVID-19 related claims will affect an employer's future premiums, but generally the prevalence of claims lead to higher premiums.

#### **Employment Practices Liability (EPL) Insurance**

Rapidly adopted alternative work schedules and other sudden operational changes heighten the risk of overtime and sick leave law violations. They can also lead to inadvertent workplace safety violations under the California Occupational Safety and Health Act (OSHA). Reductions in force, or terminations arising from poor behavior during the pandemic, may also give rise to wrongful termination claims. Provided no exclusion applies, claims similar to these will fall under EPL insurance coverage.

### **Business Interruption (BI) Insurance**

BI insurance can be in the form of a stand-alone policy or an add-on to property coverage. Lost profits arising from the COVID-19 outbreak, and continuing fixed costs, may be recoverable under a BI insurance policy. Some BI policies also include Extra Expense Insurance, which covers costs in excess of those that would have been incurred absent the covered event. In the case of COVID-19, this could include recruiting and training costs associated with hiring, additional safety equipment, or other employee related expenses. However, BI insurance is subject to a number of conditions and exclusions, as discussed below.

### **Director and Officer (D&O) Insurance**

Directors and officers may have their COVID-19 related actions and inactions scrutinized. A D&O policy may provide coverage should an officer or director be accused of breaching his or her fiduciary duties.

### **Key Person (KP) Disability or Life Insurance**

KP insurance provides benefits to an employer in the event that a key employee can no longer work. Most policies provide a specific dollar amount rather than tying coverage to the losses incurred. These benefits may supplement losses arising from the absence of the key person, or may be used to cover the costs of hiring additional resources. However, in the case of disability coverage, there is generally a 30-90 day waiting period, which may exceed the recovery time for COVID-19.

### **Other Types of Insurance**

There are many other types of insurance that may provide coverage, though they tend to be industry-specific or less common. For example, travel insurance may cover sickness or death incident to travel. Similarly, political risk insurance may provide coverage based upon the decisions of foreign governments. In the wake of COVID-19, novel insurance claims are also likely to arise. For example, some have already speculated that some environmental insurance policies may cover disinfection efforts required to maintain safe working conditions.

### **The Fine Print...Exclusions**

Virtually all types of insurance are subject to exclusions, and sometimes those exclusions can be significant. For example, EPL insurance may exclude all wage-and-hour claims, and most BI policies require a connection to physical property damage (e.g., an earthquake or fire) that would seem to exclude COVID-19 induced losses. Perhaps most important, following the occurrences

of the bird flu and SARS, many insurers began adding BI policy exclusions for losses arising from viruses or bacteria. Policies with this exclusion may prove to be of little or no value in the face of COVID-19.

Even if losses fall into an exclusion, do not assume you do not have coverage. The loss may be attributable to another event that is covered. For example, the loss may arise from a government order, not from the COVID-19 outbreak itself. Also, at least a couple of states have explored the possibility of requiring insurers to provide more expansive coverage than their policies require. It is too early to say if any such legislation will be enacted. So far California has only began gathering information from insurance companies to assess the degree to which BI policies may exclude coverage. Even with legislative intervention there could be legal challenges.

### **What to Do Now**

1. Identify your insurance policies and determine which ones may provide coverage. Your insurance broker will likely be of assistance in this regard.
2. Keep detailed records of expenses and losses. Coverage may depend not only on proving that you incurred an expense or loss, but also that it was incurred specifically as a result of COVID-19.
3. Promptly notify your carrier of any claims, even if all you have received is an oral threat. If you have not received a claim but you expect to, provide a "notice of circumstances" before your policy renews, as some types of policies (such as EPL insurance) tend to be on a claims-made basis.
4. Keep organized records of any correspondence with your carrier. You may need it if it becomes necessary to contest coverage.
5. Avoid insurance scams. For a discussion of COVID-19 related insurance scams, see the website for the [Coalition Against Insurance Fraud](#).
6. If you cannot pay your premiums, request a 60-day grace period. On March 18, 2020 the California Department of Insurance issued a [Notice](#) requesting all insurance companies provide their policyholders with such a grace period. [See the press release.](#)

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Please contact one of our team members if we can be of assistance.

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