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### **Is There Business Interruption Insurance Available for COVID-19? Probably Not. But a Bill Pending in the NJ Legislature May Change That**

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With the significant potential for lengthy work disruptions caused by COVID-19, many employers are asking whether there is insurance coverage available to help offset the financial losses incurred during this crisis. The answer is that some policies may provide coverage, but the results will be highly dependent upon the policy language and the specific facts surrounding the work disruption.

Importantly, however, there is a bill pending before the New Jersey Legislature that would compel carriers to provide business interruption coverage for COVID-19 regardless of the policy language.

#### **The Insurance Policy**

Many commercial property insurance policies include business interruption coverage. Business interruption (or business income) insurance is intended to cover the loss of income that a business suffers after a disaster. However, the insurance is typically subject to several important coverage requirements. The policy will cover losses sustained due to a necessary suspension of a company's operations, but the suspension must be caused by "direct physical loss of or damage to property at the premises described" in the policy. So the question will be whether insureds can establish actual property damage at the premises and if they cannot, there will be no coverage.

Further, the loss must be caused by or result from a covered cause of loss. Oftentimes, policies define "covered cause of loss" as any cause of loss except those specifically excluded. But relevant exclusions can include ordinance or law (excluding coverage for losses resulting from compliance with a law) or governmental action. Some policies have coverage additions that restore coverage for civil authority, such as when access to the covered property is prohibited by governmental action. However, even that coverage requires damage to the insured property or, potentially, to another property in the immediate area.

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At this time, there is little guidance as to whether contamination of a place of work by a virus constitutes “damage to property” sufficient to trigger business interruption coverage, and that issue is likely to be the subject of significant litigation in the years to come. It may be that the presence of the virus in the place of employment is considered “physical damage,” such that if an employee who was at work is diagnosed with COVID-19, there is a potential for coverage. But if a place of employment closes down as a result of an employer’s concern about spreading the disease, or in an effort to “flatten the curve”, or even if the government requires a shutdown by the employer, those facts are likely not sufficient to trigger business interruption coverage because there is no “property damage.”

To make matters more difficult for insureds, many business interruption policy forms have a specific exclusion for losses due to bacteria or viruses. For insureds whose policies contain those exclusions, there will be no coverage for COVID-19 even if the workplace was in fact contaminated.

However, all of this could change if a pending bill is passed by the New Jersey Legislature.

### **The Proposed Bill**

There is currently a bill (A-3844) before the New Jersey Legislature that would require insurers to provide business interruption coverage for COVID-19. The bill was introduced on March 16<sup>th</sup> and is on a second reading in the Assembly. It would mandate that business insurance carriers provide coverage for COVID-19 for insureds with less than 100 employees, seemingly without regard to the policy’s terms.

The rationale underlying the bill is that, while the Insurance Services Organization (ISO) drafted the virus exclusion for business interruption coverage, it also proposed an endorsement allowing businesses to “buy back” that coverage, but the buy back has not been approved by the NJ Department of Banking and Insurance. The bill would allow the carrier who paid the claim to seek reimbursement from a fund created by a DOBI levy on insurers in this state. Essentially, the proposed bill seeks to provide coverage where none exists, and to spread out the costs of providing that coverage on all NJ insurers equally.

### **Impact of the Proposed Bill**

If the bill passes, it may provide significant coverage benefits to qualifying NJ businesses. But it will also lead to a fascinating and high-stakes legal dispute as to whether an insurance carrier can be required by the legislature to cover a risk that is clearly excluded by its policy. In the meantime, New Jersey businesses who may have a claim would be wise to take the time to document their claim and to keep all records so that a claim can be pursued at a later date.

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