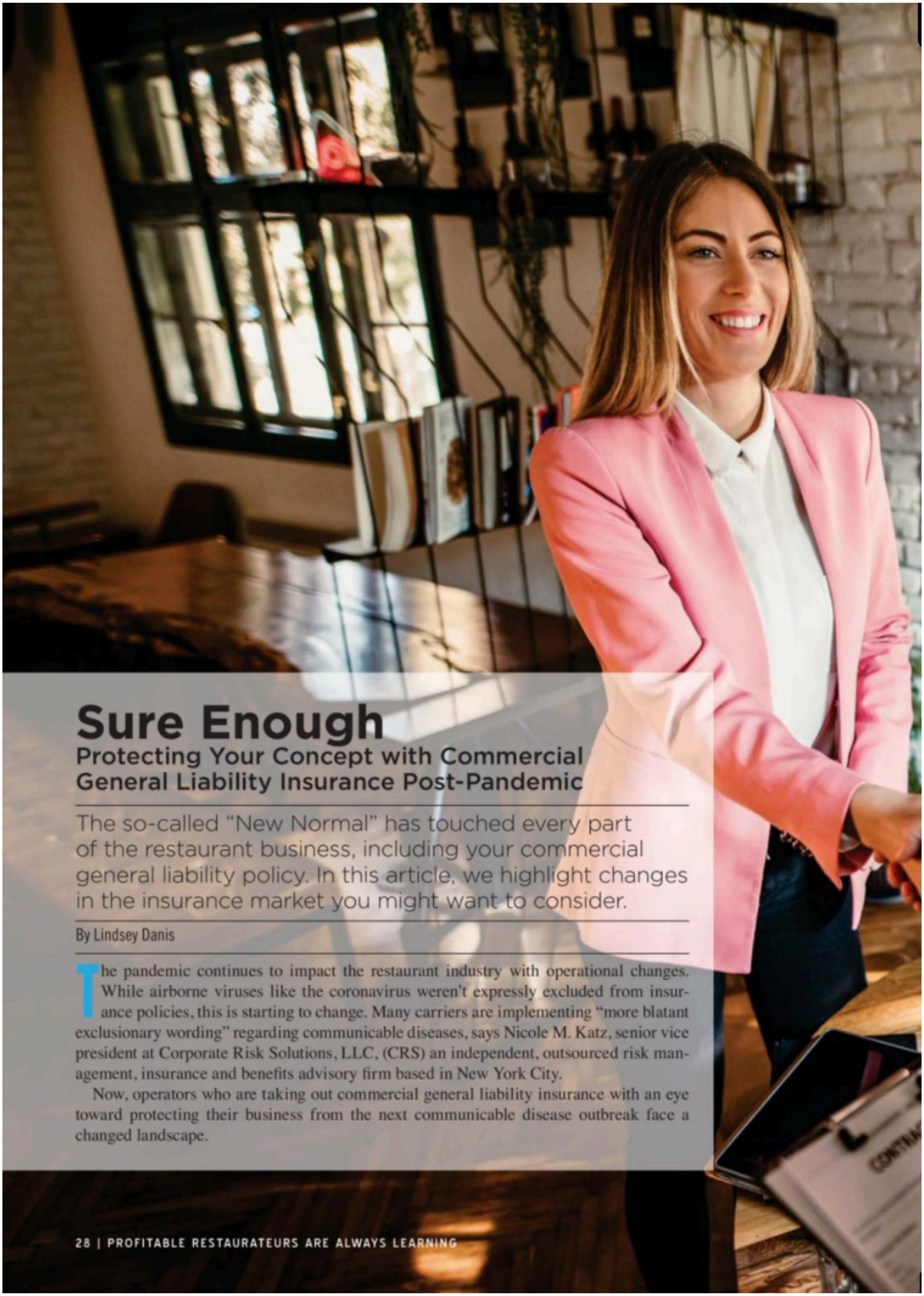

Sure Enough

Protecting Your Concept with Commercial General Liability Insurance Post-Pandemic

The so-called "New Normal" has touched every part of the restaurant business, including your commercial general liability policy. In this article, we highlight changes in the insurance market you might want to consider.

By Lindsey Danis

The pandemic continues to impact the restaurant industry with operational changes. While airborne viruses like the coronavirus weren't expressly excluded from insurance policies, this is starting to change. Many carriers are implementing "more blatant exclusionary wording" regarding communicable diseases, says Nicole M. Katz, senior vice president at Corporate Risk Solutions, LLC, (CRS) an independent, outsourced risk management, insurance and benefits advisory firm based in New York City.

Now, operators who are taking out commercial general liability insurance with an eye toward protecting their business from the next communicable disease outbreak face a changed landscape.

AUDITS ARE BACK IN VOGUE

During the pandemic, many insurance companies decided they would not perform audits. For commercial general liability, the audit looks at the business's payroll and their exposure to risk. A successful audit helps restaurant operators by making sure they have the right coverage for their business and that they are paying the right amount for their policy. "Generally, you make more, you pay more, you make less, you pay less," Tina Gerard, a sales executive with the John M. Glover Insurance Agency, explains.

In 2021, audits would have looked back at 2020, a year when the pandemic greatly impacted sales. While companies may have waived audits in the past, Gerard says they're now coming back. Audits typically occur at the end of the year as the insurer looks over a customer's numbers. Operators that did better than expected may face a surprise bill, while those who had a less successful year may actually get money back.

Looking at commercial general liability policies, "not much has changed outside of instituting communicable disease exclusions," Katz says. Rather than limiting exclusions to specific named diseases, Katz says insurers are implementing separate endorsements that have broader language regarding viral diseases "to be clearer to insureds that the policy is not intended to provide coverage" for these types of diseases. Insurers often have to purchase coverage to underwrite their insurance products, and the terms of this coverage can limit the coverage they can offer their customers.

Within this landscape, Katz recommends operators look at coverage to make sure it is as broad as can be. Regarding viral diseases, she says "silence is best, so no exclusionary wording." If her clients get renewal policies with exclusionary language, Katz says, "we'll try to push back, but we know it's very difficult to get those types of exclusions removed."

Kim Patlis Walsh, president and managing director at CRS, adds that the burden of proof is difficult with Covid. When Covid-related claims come up, carriers tend to deny coverage or litigate since it is more difficult to prove that a restaurant is the source of a Covid infection than, say, a foodborne illness.

Earlier in the pandemic, operators might have put in Covid-related claims to get in the queue, in the hopes that insurers would cover these things. However, many have seen their claims denied. Covid-related claim denial extends beyond commercial general liability. Business interruption insurance, a type of insurance that is marketed to protect against disaster-related interruptions, didn't cover pandemic-related losses, either. While this surprised many operators who figured the state-mandated shutdowns would count as interruptions, Katz was not surprised. "There wasn't physical loss, which has to occur before you can put in a business interruption claim," she explains.

Nevertheless, some restaurant operators are suing their insurance providers under the belief that the pandemic should be covered. These lawsuits include a group of San Diego-area restaurants suing Farmers Insurance for denying business interruptions claims. At the time, Farmers had explicitly excluded losses due to bacteria or viruses. They did not have a specific pandemic-related exclusion. The plaintiffs are arguing that the virus was not responsible for the restaurants' losses and instead place blame on statewide mandates that led to lost revenue.

The implications for these types of lawsuits remain to be seen. Rather than focus on a lawsuit that might recover some lost revenue, a better strategy is to understand where commercial general liability coverage works and know what add-on policies can protect your concept. The insurance agents interviewed for this article suggest several additional areas of coverage restaurant operators might wish to purchase to fully protect themselves coming out of the pandemic.

Jeff Kroeger, head of commercial lines for World Insurance, names employment practices liability insurance as something to keep top-of-mind. Particularly if the concept has a fun and social environment for employees, he says there's "a big risk where your employees could bring a claim for sexual harassment or discrimination for not getting favorable shifts."

Kroeger also recommends cyber insurance, which he says might run \$1,000 to \$2,000 a year for a restaurant that does \$1 million in sales. Cyber insurance would cover things like a data breach in which employee personal records were compromised. There's also cyber liability coverage for fraud and incidents involving credit card exposure. Ransomware is another cyber issue that deserves operator consideration, as it is "becoming a huge trend" for operators.

POS providers may offer some level of cyber coverage, but Kroeger warns that this often isn't enough. If the POS provider suffers a breach, not only is your ability to do business compromised, but so is that of all their clients. If you try to seek recompense from them, you will join a long line of clients. For this reason alone, Kroeger believes that having a dedicated cyber policy to protect you is beneficial.

Tina Gerard, a sales executive with Norwalk, Connecticut John M. Glover Insurance Agency, recommends wage and hour insurance. Gerard says many restaurants in Connecticut, where she is based, are being sued by employees for wage and hour disputes related to pandemic work practices in which employees stepped into other roles and weren't paid accordingly.

For example, Gerard mentions that during the pandemic, servers who were paid at a lower rate with a tip credit sometimes did tasks like inventory that were outside of their role and would have normally commanded a higher rate. If they weren't paid at a higher rate for the time they did those tasks outside their role, there's the potential for a lawsuit.

Delivery Challenges

During the pandemic, many operators added delivery for their concept. This adds another area of consideration for insurance. Kroeger encourages operators to limit delivery to third-party as much as possible and collect certificates of insurance from any delivery partners.

With everything else operators have going on, he says "it's extremely hard to take care of that in-house and use their own drivers and fleet to deliver." It's also expensive to get insured for in-house delivery. Says Kroeger, "Restaurants with delivery have always been a frowned-upon class with unfavorable auto insurance rates, so relying on the third party and making sure there is coverage is important."

Walsh and Katz note that third-party delivery services bring additional exposure to restaurants where risk is concerned. Not only is there the driver safety component, in some cases alcohol delivery is an issue. They recommend operators who rely on third-party delivery services implement strong contracts that protect them from third-party liability should an incident take place.

What if employees deliver food? It can be done, but like Kroeger, they note that it isn't easy. Third-party services check employee backgrounds and driving records to reduce their risk, so if you're planning a DIY delivery approach, you should follow their lead. When it comes to insurance, Walsh and Katz recommend operators mandate their employees carry a certain amount of personal auto insurance in case of accidents. They also recommend operators purchase what's known as non-owned vehicle liability insurance to reduce exposure.

In the event of an accident, an employee's personal auto insurance is the first line of resource. They might not have enough insurance or, even worse, they might have a lapsed policy. In that case, their employer – that's you – may be held liable since they were using their own vehicles (or rented vehicles) for work duties. Non-owned auto coverage protects the business from risk, but operators may wish to mandate personal insurance limits for their workers or to outsource delivery to third-party.

Protection Going Forward

When asked whether insurers are likely to develop a product to cover gaps in the marketplace like explicit disease coverage in commercial general liability, Walsh and Katz say it's unlikely given the unpredictability of a threat like Covid. When claims aren't predictable, insurers have a tougher time quantifying what to expect on their end. Rather than get into an unpredictable situation, they prefer not to offer coverage. The two compare it to the landscape of asbestos claims, which threatened the health of the insurance industry in previous decades.

Katz also points out that exclusions tend to make their way up the ladder, impacting excess coverage areas. Many insurers revised their lead umbrella or excess liability insurance policies to exclude communicable diseases "to double protect themselves."

These changes help insurers protect their bottom lines, but what about restaurants? Walsh, Katz, Kroeger, and Gerard all offer tips to help independent restaurant operators better protect their businesses moving forward.

Walsh puts the matter in the context of headwinds independent operators face in this environment. Revenue is down as a result of the pandemic. To stabilize their business, many rely on takeout and delivery, which creates extra risks. Prime costs are up, thanks to rising wages, inflation and supply chain instabilities. Many operators are short-staffed and rightly focused on keeping a safe work environment safe so their employees don't get sick and call out. Given all these factors, going underinsured adds a financial risk to the business. If there are multiple events and the operator doesn't have enough coverage, it could threaten the health of the business, she notes.

Kroeger recommends that new operators and established operators seeking to expand pay close attention to the level

A FLUID MARKET

The restaurant insurance carrier market has always been "pretty fluid," says Jeff Kroeger, head of commercial lines for World Insurance. National direct carriers come in and out of the space every few years. Post-pandemic, Kroeger says there's been a contraction in the market as "key players had to change their guidelines or exit the space," and this leaves fewer players to choose from.

There is a related issue with excess liability, which offers coverage above and beyond commercial general liability. Kroeger says that many of the national carriers are reluctant to offer umbrella insurance to restaurants that emphasize nightlife, entertainment and drinking. Thus, concepts like bars or taverns that move a lot of liquor often have to seek out programs that cater to their needs, and are charged accordingly.

COMMERCIAL GENERAL LIABILITY INSURANCE IN REVIEW

As you likely know, your commercial general liability (CGL) insurance covers your business against property damage, personal injury, and certain types of negligence caused by business operations. This coverage might apply if a customer falls while visiting your restaurant and is injured, if someone comes down with salmonella while dining at your restaurant and is sickened, or if a customer has an auto accident in your parking lot because it was icy after • a winter storm.

Your policy covers your legal defense in the event of a lawsuit as well as damages up to the amount specified in your policy should you be found legally liable. An exclusion is a provision within an insurance policy that eliminates coverage for certain acts, property, types of damage, or locations. A standard commercial general liability policy does not cover liquor-related claims, so restaurants who sell alcohol typically add on liquor liability coverage for protection.

This policy doesn't cover your liability if employees are injured rather than guests; that's what workers compensation is for. It doesn't cover delivery service, since it protects the place of business. As many restaurant operators learned in the pandemic, insurers did not cover Covid-related cases where guests claimed that a restaurant gave them Covid, either.

Among other exclusions to commercial generality liability to note:

- If an employee of the restaurant signaled intent to harm (i.e., initiates a fight), the resulting injuries to a guest won't be covered even though bodily injury is otherwise covered.
- Injuries or damages related to pollution, such as a chemical spill at your restaurant, are not covered.
- Auto-related injuries aren't covered so you need commercial auto insurance for business vehicles.
- More broadly, anything covered by another policy (such as workers compensation) isn't also covered by CGL.

of insurance that a lease requires before signing. Kroeger says that by the time new customers come in, oftentimes "they've already signed a lease and the limited liability requirement could be astronomically high," but now they're locked in. He recommends operators consult with their attorney and local insurance agent before committing to a lease. The local agent may be able to help negotiate the amount of insurance required, says Kroeger, adding that "most landlords are very open to negotiating the insurance requirement." While "we're never gonna say you have enough" insurance, "having the flexibility to make a decision as to what makes sense for you is very important," Kroeger says.

On a related note, Walsh and Katz warn operators against carrying only the minimum levels of insurance required when it may not be enough to protect the business. Walsh recalls times during the pandemic when concepts that were closed experienced incidents like vandalism, flooding or fire due to faulty electric. When these concepts didn't have enough insurance coverage to protect them, it placed added stressors on restaurant operators that were also suffering from revenue shortages caused by rising food costs, wage increases to attract and retain employees, and other factors.

Advice for New and Experienced Operators

Katz advises first-time operators shopping for coverage to conduct their own benchmarks of how much insurance to buy, review the policy language for those exclusions, and to push back and get the broadest coverage possible with the help of your insurance agent.

Walsh has noticed that experienced operators are learning from the pandemic. Many are taking extra time to make sure their protocols are "best in class in order to withstand additional potential claims" and protect customers "to make sure they can make back money they lost in the pandemic."

Gerard advises new operators to "cover your assets" of your business entity: for an LLC, cover the assets of the LLC, for example. In her market, she sees a lot of small entrepreneurs opening restaurants who don't come from a business background. For these operators, Gerard says it's extremely important to take the time "to understand what they need to be covered for, what those coverage areas mean and how they work." She recommends state restaurant associations as a resource, calling them a "one-stop shop for expertise."

For experienced operators, Gerard recommends getting an insurance review. She notes that restaurants are often approached by newer insurance agents, "which puts them in a vulnerable position of maybe not getting the most experienced people offering quotes." Coverage areas can be overlooked by these novice agents. If operators don't have a business background, they may not realize what they're missing until it's time to file a claim and they're not protected in the way they thought. **RS&G**