Potential Insurance Coverage and Employment Implications from COVID-19

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Today’s Line Up

• Moderated by Lori Seidenberg, First Vice-President and RIMS Delegate – New York Chapter of RIMS

• Panelists:
  
  o Talene Carter, EPL Product Leader, Willis Towers Watson
  o Marshall Gilinsky, Shareholder – Anderson Kill
  o Tarique Nageer, Senior Vice President, Specialized Risks - Marsh USA
  o Todd B. Scherwin, Regional Managing Partner – Fisher Phillips
Part One – Workers Compensation and Employment Related Matters
Willis Towers Watson Communicable Disease Response Team

- National Casualty Leadership Team
- 30+ Years Industry Experience
- Member of WTW Communicable Disease Response Team

WTW COVID-19 Consulting

- Global Task Force
- Benefits, Actuarial, Broking, Claims Practices, HES, Disaster Recovery
Assess whether employees will be eligible for Workers Compensation if they miss work due to COVID-19

**Situation:**
Transmission/contraction allegedly or potentially occurred within the course and scope of employment

**Be sure to check:**
State precedent for “course and scope of employment”

Claimant is or could be deemed an employee

**Definition of “employee” under state statute**

**Contributing Factors**
- Contraction/Transmission is “peculiar” to the employee’s job duties (i.e. “peculiar” to employment as a nurse)
- The disease was transmitted at a clearly identifiable point in time arising out of an “accident”
- Contraction occurred while on temporary foreign assignment
- The state workers compensation statute specifically includes or excludes “ordinary disease” as an occupational disease

THE CDC, OSHA, State Governments or Regulators could change the meaning of “ordinary disease” or take a number of different actions that could impact applicability of coverage

Source: 2020 Willis Towers Watson COVID-19 Survey – Actions taken
What is Workers Compensation Occupational Disease and Why is it Different?

A Subpart of Workers Compensation Statute

- Developed to cover unique diseases peculiar to the workplace as disease was a potential loophole in workers compensation law
- The issue of “ordinary disease”
- Statutory Coverage Limit
- If a group of employees are exposed to occupational disease is it a single accident or multiple occurrences? Is it addressed in the program agreement?

**Occupational Disease is found in state statute**

Texas Statutory Definition of Occupational Disease:

"Occupational disease" means a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. The term includes a disease or infection that naturally results from the work-related disease. The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease.

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Different from Employers Liability
Willis Towers Watson

Talene M. Carter
National Employment Practices Liability Product Leader
Employment Practices Liability Insurance (EPLI)

What is EPLI?

▪ Provides coverage for claims alleging employment practice violations, such as, wrongful termination, discrimination or harassment, against the Company, its employees and directors and officers

▪ Also provides third party liability coverage for discrimination and harassment claims brought against the employer or its employees by a third party

▪ Provides coverage for defense costs, settlements, judgments and awards associated with responding to employment-related lawsuits.
Covid-19 – Potential employment related exposures

➢ Discrimination
➢ Harassment
➢ Invasion of privacy
➢ Failure to accommodate
➢ Retaliation
➢ Wage and hour issues
Potential EPLI coverage concerns

➢ Bodily injury exclusion

➢ Benefits exclusion

➢ Family Medial Leave Act (FMLA)

➢ WARN Act exclusion
Best Practices

➢ Work with counsel to ensure compliance with legal obligations, particularly under FMLA, ADA, paid sick leave laws, wage & hour laws, etc.

➢ Communicate plan to employees, especially line managers who will be responsible for addressing these issues with their employees.

➢ Ensure that any policies and procedures that are being implemented do not have a discriminatory impact.

➢ REPORT CLAIMS!
COVID-19 Issues for Employers

Presented by:
Todd B. Scherwin
Regional Managing Partner Fisher & Phillips LLP
Phone: (213) 330-4450 | Email: tscherwin@fisherphillips.com
CONSIDERATIONS FOR EMPLOYERS

- Establish a point of contact in human resources or elsewhere in your company for employees that have concerns.
- Remind employees about policies concerning absences and working from home, including vacation, sick pay, FMLA, unemployment, and short term disability.
- Train supervisors on overreaction impacts and importance of adhering to antidiscrimination policies.
- Keep track of updates from CDC and WHO.
- Employee personal travel:
  Employers cannot prohibit otherwise legal activity, such as personal travel abroad by an employee.
LEAVE OF ABSENCE AND SHUTDOWN ISSUES/FAQ’S

• Can I send people home if they are sick?
  • Pay them?
• Can I demand/request a doctor’s note
• Do I need to provide paid time off or other pay during furlough or shutdown?
• Do I need to provide WARN or other notices?
• If I require people to work from home how do I pay them?
LEAVE OF ABSENCE AND SHUTDOWN ISSUES/FAQ’S

• Can I reduce pay?
• What about salaried employees?
• What if I send people home in the middle of a week or day?
• If I furlough for a certain time, will I end up terminating them and need to give final pay.
• Can I reduce hours in certain departments as opposed to company wide?
Part Two – Property Insurance Related Matters
• Property Insurance Considerations

Presented by:
Tarique Nageer
Marsh LLC
Phone: (212) 345-5073 | Email: Tarique.i.nageer@marsh.com
Coronavirus Planning, Response, and Recovery
Limited Coverage Available Under Traditional Policies

Property/BI

- If the virus is present on insured premises, policies could provide coverage for:
  - Decontamination costs.
  - Communicable disease cleanup.
  - Interruption by communicable disease.
- Contamination exclusions, however, could apply.
Coronavirus Planning, Response, and Recovery
Preparing Your Claim

• Work with brokers and claims consultants to review and understand coverage.
  – Consider engaging legal counsel.

• Start gathering documentation.
  – Keep records of anyone entering your premises.
  – Document any relevant government communications.
  – Take note of any specific locations affected by any action or recommendation.
  – Measure financial impacts.

Potential Coverage Triggers

• Presence of virus on an insured’s premises.
• Presence of virus at a customer or supplier location.
• Presence of virus in a nearby geographic area.
• Mandatory quarantines.
Managing the Coronavirus Outbreak’s Continuing Effects
How Marsh & McLennan Is Supporting Clients

• **Marsh** colleagues are helping clients:
  – Understand how insurance may respond and identify new coverage opportunities.
  – Organize claims teams and identify information needs.
  – Model, assess, and quantify potential operational effects; respond; and recover.

• **Mercer** is helping organizations manage the impacts of the outbreak on their people, including workforce strategies, health and safety, and compensation and benefits.

• **Oliver Wyman** is helping businesses across all sectors assess their strategic and operational vulnerabilities and develop resilience and recovery approaches.

• **Guy Carpenter** is helping organizations reduce their potential pandemic losses through new risk financing solutions.

• **Marsh & McLennan businesses** are actively helping companies understand and address COVID-19's impacts and develop strategies to plan for and respond to future crises.
Managing COVID-19 Risks

Recent disease outbreaks, such as COVID-19, the Zika virus, Ebola (Zaire strain), and Middle East Respiratory Syndrome (MERS-CoV), bring to light a critical threat that should be proactively addressed. They underscore the importance of effective pandemic planning and response to minimize and mitigate employee and operational risk and reduce social and economic disruptions. Planning and response must include financial and business resilience measures and the ability to quickly react and adjust to changing scenarios.

For the latest information and insights from Marsh about how to manage COVID-19’s effects on your business and people, visit marsh.com/us/insights/research/pandemic-risk­-hub.html.
Potential Insurance Coverage and Employment Implications from COVID-19

Presenter:
Marshall Gillinsky, Esq.
(617) 221-5445
mgilinsky@andersonkill.com
Disclaimer

The views expressed by the participants in this program are not those of the participants’ employers, their clients, or any other organization. The opinions expressed do not constitute legal advice, or risk management advice. The views discussed are for educational purposes only, and provided only for use during this session.
Marshall Gilinsky is a shareholder in the Boston office of Anderson Kill and practices in the firm’s Insurance Recovery and Commercial Litigation Departments. Marshall is co-chair of the firm’s Sexual Harassment and Abuse Insurance Recovery Group, and a member of the firm’s Banking and Lending Group, Hospitality Industry Practice Group and Regulated Products Group.

During his 20-year career representing policyholders, Marshall has recovered hundreds of millions of dollars for his clients, successfully litigating disputed claims under a variety of insurance products, including property and business interruption insurance, commercial general liability (CGL) insurance, errors and omissions (E&O) insurance, directors’ and officers’ (D&O) insurance and life insurance. Marshall has represented clients on numerous high-stakes, complex insurance claims arising out of prominent losses such as 9/11, Hurricane Katrina, Superstorm Sandy and the “Big Dig” in Boston. He also focuses extensively on assisting clients that own and manage captive insurance companies, especially with respect to resolving coverage disputes between the captive and its reinsurers.
Important Issues for Analysis

➢ COVID-19 and Loss or Damage to Property
➢ Exclusions for losses caused by “virus”
  ➢ Scope of exclusion
  ➢ Coverages to which exclusions apply
➢ Extensions of Coverage
  ➢ CBI
  ➢ Civil Authority
  ➢ Loss of Attraction
  ➢ Rental Value / Leasehold Interest
➢ Evolving Orders of Civil Authority
COVID-19 as Direct Physical Loss or Damage

➢ *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-04418, 2014 WL 6675934, at *7 (D.N.J. Nov. 25, 2014) (holding that an ammonia discharge in a manufacturing facility constituted “direct physical loss of or damage to” the facility because it “physically rendered the facility unusable for a period of time”).

➢ *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App’x 823, 825 (3d Cir. 2005) (holding that bacteria contamination of a home’s water supply could constitute a direct physical loss where the “functionality” of the property is “nearly eliminated or destroyed,” or when it renders the property “useless or uninhabitable”).
COVID-19 as Direct Physical Loss or Damage

- *Port Auth. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (reasoning that when the presence of large quantities of asbestos in the air of a building renders a structure “uninhabitable and unusable,” there has been “a distinct loss to its owner” which may constitute “physical loss or damage”).

COVID-19 as Direct Physical Loss or Damage

➢ **Mellin v. Northern Sec. Ins. Co.,** 167 N.H. 544, 550-51, 115 A.3d 799, 805 (N.H. 2015) (responding to plaintiffs’ argument that “physical loss encompasses pervasive odors,” the court catalogued the “substantial body of case law in which a variety of contaminating conditions . . . have been held to constitute a physical loss to property,” and concluded that “physical loss may include not only tangible changes to the insured property, but also changes that . . . exist in the absence of structural damage”).

➢ **Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.,** 968 A.2d 724, 734 (N.J. Super. Ct. App. Div. 2009) (holding that the undefined term “physical damage” was ambiguous and that the trial court construed the term too narrowly, in a manner favoring the insurance company and “inconsistent with the reasonable expectations of the insured”).
Exclusions

➢ Exclusions must be unambiguous in order to bar coverage
➢ Exclusions vary in scope:
  ➢ Virus
  ➢ Infectious disease
  ➢ Microorganism
  ➢ Bacteria
  ➢ Contaminant
  ➢ Mold
  ➢ Pollutant

➢ Coverages to which exclusion applies
Common Time Element Coverage Extensions

➢ Extensions of Coverage
  ➢ CBI
  ➢ Civil Authority
  ➢ Loss of Attraction
  ➢ Rental Value / Leasehold Interest

➢ Evolving Orders of Civil Authority
Thank you!