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## **COVID-19 and Insurance Coverage Considerations for Nonprofits**

Many nonprofits are raising questions about the availability of insurance coverage to protect against economic loss and liability arising from the COVID-19 pandemic.

The terms of many insurance policies vary by insurance carrier, and even “standardized terms” often have been modified to be specific to the services provided by each nonprofit organization. Nevertheless, it is possible to outline emerging coverage considerations for nonprofits seeking to mitigate claims and losses associated with COVID-19. This FAQ has been prepared for informational purposes. Nonprofits are encouraged to consult their own insurance advisors and counsel on specific policy issues.

### **1. What practices are suggested for nonprofits to maximize the potential for recovery on COVID-19 related claims?**

- *Retain complete copies of all insurance policies on a secure server and provide for remote access;*
- *Contact the organization’s commercial insurance broker or agent to help assess existing protections for COVID-19 related exposures;*
- *Fully and accurately document losses;*
- *As with any insurance matter, the timing of notice may be an issue. Check each insurance policy to determine when a notice of claim must be filed. If there are questions about coverage, it still may be prudent to file a claim and reserve rights;*
- *Continue to adhere to the organization’s risk management protocols, and to monitor and comply with all applicable local, state, and federal guidelines for the safety of property, employees, and clients.*

### **2. What types of insurance coverage may be triggered for losses associated with COVID-19?**

Every coverage determination will be specific to the language of the insurance policy, including exclusions, and to the nonprofit organization’s own facts and circumstances. In addition, federal and state governmental intervention may change the role that the insurance industry is to play in providing recovery in the face of widespread disruption to all sectors, including the nonprofit community. However, as a starting point, the following property and liability coverages should be evaluated:

#### **Business Interruption Coverage**

- Provides coverage for loss income and continuing expenses while an organization’s operations are shut down;
- Contained in most property insurance policies and as part of an “all risk” business owner’s policy;

- Typically, there must be direct “physical loss or damage” to the insured’s policy, business interruption by itself is not enough for recovery;
- Courts are split on whether the presence of contaminants, related to a pandemic, constitute a physical “loss” or whether there needs to be a structural alteration for the insured to recover;
- Importantly, policies may contain an express exclusion for loss or damage caused by “virus or bacteria” denying coverage;
- Other policies may contain a “civil authority exception” which, depending on the policy, could provide coverage if a “stay at home” directive is in effect;
- What if the nonprofit organization is unable to conduct community fund-raising activities due to temporary office closures? Generally, courts have held that “direct physical loss” does not include consequential or resulting economic loss.

### **Nonprofits with Specialized Insurance**

- Some property insurance policies may contain contingent business interruption coverage;
- Applies when an occurrence damages a key business partner and therefore impacts the policyholder’s own business;
- Nonprofits, particularly those in the community health care or education field, may find coverage triggered in the event the nonprofit organization requires supplies, food, or services that are not delivered due to the COVID-19 contagion.

### **Event Cancellation Insurance**

- Purchased by nonprofits for specific fundraising events or conferences;
- Covered perils usually include death, accident or illness, unavoidable delay, or venue damage;
- If triggered, the policy reimburses the organization for lost profits and to pay for refunds the organization must pay to attendees or sponsors;
- Timing of the cancellation may be important; policy cannot be triggered for certain anticipated reasons; policies require circumstances beyond the control of the policyholder;
- Coverage typically require efforts to mitigate losses, such as rescheduling the event;
- Policies may carry express exclusions, including for infectious and communicable diseases.

### **Commercial General Liability (CGL) Coverage**

- A CGL policy generally protects the nonprofit organization from liability to third parties for “bodily injury” or “property damage” resulting from an “occurrence”.
- “Occurrence” has been defined under case law as “an accident, including continuous or repeated exposure to substantially the same harmful conduct”.
- Questions of liability arising from the COVID-19 epidemic will be focused on whether the nonprofit organization caused a staff member, volunteer, or client to be harmed by failing to exercise reasonable care in implementing, enforcing, or warning of the risk of potential exposure to the Coronavirus.

### **Workers’ Compensation Insurance**

- Covers employees who suffer injury or illness in the workplace; determined by state law;
- New York has made available additional benefits under the state’s workers’ compensation law to COVID-19 affected employees. The law amends the New York Workers’ Compensation Law to

further define “disability” as an inability of an employee to perform the employee’s job duties or any other duties offered by the employer due to a mandatory or precautionary order of quarantine or isolation due to COVID-19.

#### **Directors and Officers Liability (D&O) Coverage**

- Covers claims against directors and officers for breach of their fiduciary duties;
- There is a potential for exposure if the directors or officers did not act prudently to protect staff or clients against contagion risks;
- Many D&O policies exclude claims of loss based on “bodily injuries”. Such exclusions continue to be challenged in the courts.

#### **3. Can nonprofits purchase insurance coverage now to protect against liabilities caused by COVID-19?**

- Each nonprofit organization’s commercial insurance broker or agent will be able to advise on whether the organization may now purchase or add endorsements to existing policies to cover claims related to the pandemic outbreak;
- To extent it is available, rates on line and exclusions will all need to be fully assessed;
- Note that the parties cannot lawfully back date a policy; coverage generally cannot apply retroactively;
- Federal and state governments may step in to protect consumers by ensuring the availability and affordability of insurance for COVID-related risks.

#### **4. Key takeaways for nonprofits in evaluating insurance coverage**

- *Insurance continues to be a significant risk management tool for nonprofits seeking a cushion against economic loss during the COVID-19 crisis.*
- *As always, the starting point will be the policy itself and an understanding of the kinds of coverages that may be impacted by COVID-19.*
- *Nonprofits should act proactively to reach out to their advisors, evaluate the terms of their insurance coverage, mitigate losses pursuant to those terms, and provide timely notice of potential or actual claims with their carriers.*

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