

# Impact of Coronavirus (COVID-19) in U.S. Casualty Claims

## Considerations for U.S. Workers' Compensation and Liability Claims

The current coronavirus, COVID-19, is a growing concern and organizations need to understand how a broader outbreak could impact their employees, customers, brand, operations, and revenue. Aon's team of casualty claim consultants, as well as carriers with whom we are strategically aligned and respected defense counsel, have coordinated efforts to ensure our clients are aware of the casualty claim impacts on their organization.

When contemplating casualty claims exposures for the COVID-19 outbreak—and specifically U.S. workers' compensation and liability coverages—there are several questions organizations should consider regarding their potential to be directly impacted by this health crisis. These questions include:

- Do we have employees located in or traveling to areas where there have been documented and diagnosed cases of COVID-19?
- Does our business or industry (e.g. health care) increase the probability of employee exposure to infected individuals?
- Do our employees work in close proximity with vendors or other strategic partners who may have employees who are at greater potential to contract the disease?

If any of the above are answered in the affirmative, do we have a contingency plan in place to address managing and/or mitigating subject claims or their potential impacts?

Each potential case or scenario regarding COVID-19 should be independently reviewed and investigated and we strongly recommend engaging all relevant parties, in addition to contacting local health authorities. These relevant parties would include key internal decision makers, your Aon team, carrier, Third Party Administrator, approved defense counsel, and any other key strategic partners.

## Workers' Compensation Considerations

- While every jurisdiction has specific laws pertaining to workers' compensation and communicable disease claims, the general rule for most industries is that the matter would likely not be deemed compensable if the employee was considered at no greater risk than the general public. However, if it is believed that a healthcare worker, or a worker that can confirm the exposure through his/her work, has COVID-19 and it is ultimately proven that the condition was contracted at their place of employment or through associated travel, then any subsequent lost time, including the period of absence required during the quarantine/monitoring period, should trigger coverage.
- Absence from work during the quarantine/monitoring period (prior to a positive confirmation of COVID-19) may trigger coverage under workers' compensation, even if the employee ultimately tests negative for the illness. In some states, "exposure" constitutes the "injury," not the symptoms. This means employees at risk due to their work may be covered by workers' compensation during the quarantine/testing period since the exposure to COVID-19 should trigger the workers' compensation coverage and related benefits, and not the determination the employee actually contracted the disease. Employers should consider the quarantine/monitoring period covered under Family and Medical Leave Act (FMLA) and employers should run FMLA concurrent with workers' compensation lost time. (Note: If the employee's spouse needs to be quarantined and the spouse's employer has Short-Term Disability (STD) coverage, that coverage may respond for the spouse during the quarantine/monitoring period).
- Equal Employment Opportunity Commission (EEOC) / Americans with Disabilities Act (ADA) Exposure – An employer might require that an employee who is considered to be at a greater risk than the general public stay home from

Please contact your Aon Claims Consultant for more information on Coronavirus-specific workers' compensation and liability considerations.

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work or be screened for COVID-19 as part of the employer's infectious disease response protocol. The ADA prohibits medical examinations of employees except in limited circumstances, such as when there is a direct threat to an individual's or others' health. However, COVID-19 could fit in one of the exceptions if such medical examinations are deemed a legitimate, business need. Employers should work closely with their legal counsel to ensure any company screening process limits testing to COVID-19 and not other illnesses or disabilities the worker might have.

- Monitoring the latest updates regarding exposure areas, as well as the location and movement of employees becomes critically important in mitigating the potential exposure to workers' compensation claims associated with this current COVID-19 outbreak or any other communicable disease.
- As the situation unfolds, it is possible that the insurance industry may experience negative coverage interpretation trends regarding COVID-19. Potential concerns that could lead to declinations might include alleged serious or willful misconduct of the employer, or their alleged failure to comply with health and safety laws or regulations.

#### **Texas Non-Subscription Considerations**

- For Texas employers who are non-subscribers, an employee who contracts COVID-19 through work or through travel related to work, could reasonably be expected to have coverage triggered. However, every case could potentially be treated differently depending on the employee benefit plan that the employer has in place, as well as the excess policy which they have purchased. It is important to review the employee benefit plan and policy in each case. There are cases in which carriers will not deviate from the employee benefit plan and could start denying coverage once the employee benefit plan is exhausted; other carriers will work with the employer and continue to pay benefits.
- As the situation unfolds, it is possible that the insurance industry may experience negative coverage interpretation trends. Some carriers are exploring the possibility of excluding coronavirus from employer's liability coverage for employers in certain industries (defense and energy are examples). Care should be taken to review liability policy language for any such provision.

#### **Employer's Liability Considerations**

- If an employee contracts COVID-19 through work or through travel related to work and claims that the infection is a result of the employer's negligence, the employee may sue under employer's liability. If a spouse, child, parent, brother or sister of that employee is infected by the employee, that family member could also make a claim through the employer's liability coverage or the general liability policy (see "General Liability Considerations" below).
- As the situation unfolds, it is possible that the insurance industry may experience negative coverage interpretation trends. Some carriers are exploring the possibility of excluding coronavirus from employer's liability coverage for employers in certain industries (defense and energy are examples). Care should be taken to review liability policy language for any such provision.

#### **Foreign Voluntary Workers' Compensation and Employer's Liability**

- U.S.-based companies having foreign subsidiaries or employees traveling to, or employed in, a foreign country may be rightly concerned about how COVID-19 might affect their employees' well-being and their duty as employers. Typically, a foreign casualty program will include a coverage part for foreign voluntary workers' compensation and employer's liability. The former might often extend state- or country-of-hire benefits for covered injuries; the latter might include a limit of liability, per employee, event or in the aggregate for endemic disease only. The World Health Organization has classified COVID-19 as a global health emergency and thus the employer's liability coverage would likely not apply. However, there may be two instances these coverages might respond:
  - o For benefits resulting from contracting the illness during employment under foreign voluntary workers' compensation, subject to the state or country-of-hire benefits, if applicable
  - o For repatriation or evacuation services to move the injured employee to their home country, and in some cases, with their family and/or dependents

Also, special care should be paid to the *other insurance* clause in such policies, especially for the foreign voluntary workers' compensation section. Some foreign casualty policies may only respond

on a contingent basis, meaning only if the other insurance has first denied coverage or if the other insurance is deficient in its application.

### General Liability Considerations

- The most likely scenario for a potential liability claim may be alleged negligence from failing to protect a customer and/or invitee from being exposed to the virus. However, it should also be noted that general liability claims could include those from an employee's family due to his/her workers' compensation claim. These claims could arise from exposure due to the employer's alleged failure to use reasonable care to protect workers and their families.
- As the situation unfolds, it is possible that the insurance industry may experience negative coverage interpretation trends. Some carriers are exploring the possibility of excluding COVID-19 from general liability coverage for employers in certain industries (defense and energy are examples). Care should be taken to review liability policy language for any such provision. In addition, here are some potential policy exclusions which could be considered:
  - o *Expected or Intended* – Focusing on the first (expected) and depending on the circumstances; an argument could be made that the Insured or reasonable person would / should have expected the exposure.
  - o *Pollution* – Most policies have a relatively broad definition of pollution, and depending on the circumstances and specific case law, there could be some gray area to state COVID-19 was a pollutant.
  - o *Bacteria* – While this coverage exclusion's validity might be more problematic, the specific circumstances and case law need to be reviewed. It should be noted there are specific differences between a virus and bacteria.
- Protecting your organization from COVID-19-related liability exposures should necessarily include a complete examination of your present practices

regarding how your company interacts with third parties, both in terms of your premises and direct contact with your employees. The focus of any enhancement to process and policy should be centered on protecting your organization from your potential negligence. While any third party impacted by this disease through interaction with your business can make allegations, taking the appropriate steps to insulate the company from being found negligent is the key to affirmatively defending any related claims.

### What's Next?

Aon will continue to monitor this situation and will work closely with its clients to strategize responses to any potential claims situations. As and if this situation progresses, which may include the announcement of specific coverage interpretations from carriers, we will continue to keep our clients abreast of potential changes in their exposures. Meanwhile, should you have any questions about this topic or how it may impact your claims program, please contact your Aon claims consultant. Also, please continue to check and reference the Aon Coronavirus Response Site and other announcements made by key organizations. Here are the key web sites and resources to help keep abreast of the most current information and discussions regarding the COVID-19 exposures:

- Aon Coronavirus Response Website: [www.aon.com/coronavirus](http://www.aon.com/coronavirus)
- Centers for Disease Control and Prevention (CDC): [www.cdc.gov/coronavirus/2019-nCoV/index.html](http://www.cdc.gov/coronavirus/2019-nCoV/index.html)
- World Health Organization (WHO): [www.who.int/emergencies/diseases/novel-coronavirus-2019](http://www.who.int/emergencies/diseases/novel-coronavirus-2019)

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