

COVID-19 Risk in the U.S. Healthcare Industry—Potential Insurance Coverage Implications

To help clients envision how insurance policies might apply to Coronavirus (COVID-19)-related exposure in a U.S. healthcare setting, we've created the fictional scenario below. This scenario has been divided into three (3) phases: A man's visit to the doctor's office, a subsequent visit to the Emergency Department of a hospital, and finally, the hospital stay. The three phases are designed to walk through a hypothetical progression of contact that could reasonably be expected to occur, and illustrate various ways in which exposure might present itself and how coverage may respond.

The scenario below is for illustration purposes only and is not an exhaustive review of applicable coverage; rather, it focuses on the more traditional lines of coverage for a healthcare organization. The scenario itself is fictional, and any resemblance it may bear to any actual facts, circumstances or locations is purely coincidental.

This coverage response scenario is provided only for general informational purposes and is not intended to provide individualized business or legal advice. Any description, summary or highlights of coverage presented herein does not amend, alter or modify the actual terms or conditions of any insurance policy. Consult your policy for terms and conditions as applicable to your specific circumstance. Should you have any questions regarding how the subject matter of this coverage scenario may impact you, please contact your Aon team member or other appropriate advisor. We further strongly encourage you to seek additional safety, medical and epidemiologic information from credible sources such as the Centers for Disease Control and Prevention and World Health Organization.

Phase 0: Infection

Scenario

Ryan becomes infected with COVID-19 traveling in China. He does not develop symptoms until after returning home. He could be infectious during the flight, but no need to deal with that here, as we are talking about threats to healthcare.

Phase 1: Doctor's Office

Scenario Phase 1 Description

24 hours after developing symptoms, Ryan seeks care at his local physician's office. While checking in, Ryan, who is coughing and sneezing, comes into contact with other patients in the waiting room. Children and adults are present. Ryan is ushered to an exam room and seen by the doctor. The physician suspects a seasonal flu and sends Ryan home to bed.

Exposures

- The droplets that Ryan emits when coughing and sneezing can travel up to 6 feet and be inhaled by those around him. Droplets may also land on surfaces that are touched by people, who then touch their noses, mouths and eyes. Other patients, visitors, medical professionals, employees and contract staff.
- Ryan has been misdiagnosed. As a result, he may sustain unnecessary suffering or death.
- Doctor's office and adjacent properties may need to shut down for disinfection process.
- Ryan has been sent out into the community with infectious disease and may infect third parties.
- Infectious medical waste created.

We're here to empower results

For more information, please contact:

Gisele Norris, DrPH
Managing Director,
Western Region
Aon National
Healthcare Practice
+1.415.458.2973
gisele.norris@aon.com

Kathryn Meyers
Managing Director
of Brokering
Aon National
Healthcare Practice
+1.312.381.5389
kathryn.meyers@aon.com

Potential Insurance Response

Healthcare General Liability: In this phase of the scenario, there could be negligence with respect to: failure to properly screen someone who could be carrying a novel infectious virus; or failure to follow proper infection control protocols. In the case of negligence and subsequent claims arising from non-patient/non-employee third parties (e.g., the parent of a different patient who is also present in the waiting room), the insured may have recourse through this policy arising from claims of “bodily injury” or “property damage”. “Bodily injury” claims arise from bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time. “Bodily injury” includes damages claimed by any person for care, loss of services or death resulting from the “bodily injury”. This coverage typically excludes injury arising out of exposure to fungi and microbes; however, microbe may be defined such that it does not mean microbes that were transmitted directly from person to person. Damages for “personal injury” by third parties may be asserted and fall to this policy. Such a claim could arise if oral or written publication, in any manner (e.g., a press release), violates a person’s right of privacy; e.g., should the name of an individual who happened to be in the waiting room be released, this individual might claim violation of right of privacy. The same individual may later be notified that Ryan tested positive for COVID-19. The general liability policy may cover the cost of medical expenses associated with the individual’s medical testing and associated expenses.

Professional Liability (Including Patient General Liability): The doctor’s alleged failure to diagnose COVID-19 presents an error in the rendering of professional services and as such will trigger the professional liability policy which may pay amounts resulting from Ryan’s / his estate’s claim. If this policy is endorsed to capture patient general liability, third party claims similar to that defined above in general liability, may be captured by this policy. For example, another patient in the waiting room who is exposed to Ryan subsequently submits a claim – this may be deemed Patient general liability and thus may be covered by the professional liability policy.

Workers’ Compensation (WC): While every jurisdiction has specific law around WC and communicable disease claims, the general rule is that the injury would be considered compensable if the employee was considered at a greater risk than the general public. For Ryan in this scenario, the contraction of COVID-19 would not be considered compensable unless he was required to be at the healthcare setting as a requisite to his employment. However, healthcare workers caring for Ryan could assert exposure through work and the claim would be deemed compensable. It is important to note that if the virus is widespread, it may be difficult to establish that transmission occurred in the workplace.

If it is established that the employee has been exposed to COVID-19 at work, absence from work during the quarantine period (prior to a positive confirmation of COVID-19) should be covered under WC even if the employee ultimately tests negative for the illness.

In some states, exposure constitutes the “injury” not the symptoms, which means employees at risk because of their work should be covered by WC during the quarantine/testing period since the exposure to COVID-19 would trigger the WC coverage and related benefits and not the determination the employee actually contracted the disease.

Employers should consider the quarantine period/monitoring period covered under Family & Medical Leave Act (FMLA) and employers should run FMLA concurrent with WC lost time.

EEOC/ADA Exposure: In this phase, Ryan’s employer might require he stay home from work or be screened for COVID-19 as part of his company’s COVID-19 response protocol.

The Americans with Disabilities Act (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. Researching this section could fit in one of the exceptions if 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.

Texas Non-Subscription: For Texas employers who are non-subscribers, in this phase of the scenario, there appears to be no coverage trigger unless an employee contracted COVID-19. However, if an employee were infected, we would expect there to be coverage; 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 would be 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.

Employer’s Liability: In this phase of the scenario, there appears to be no employee infection and therefore, we would not expect any claim of employer liability. However, if an employee were infected in a work-related incident and claims that the infection is a result of the employer’s negligence, he or she 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 one of the following policies: the employer’s or general liability policies (See Phase 2 below).

Property/Business Interruption(BI)/Extra Expense: No coverage available unless:

- Insured has specific Communicable Disease coverage (offered by some insurers)
- Order of an authorized governmental agency prohibits access to an insured location as a result of the enforcement of any law or ordinance regulating the actual (not suspected) presence of communicable disease. (Generally requires that communicable disease actually be spread beyond the area where disease is normally present and the order is the result of actual and not the suspected spread of a communicable disease.)

Such coverage typically has a low sublimit.

Privacy: There is no apparent breach of privacy through this phase of the scenario. For coverage to apply, an employee in the doctor's office would either need to release Ryan's name and diagnosis or release the name and relationship of a third party who sustains a loss due to their contact with Ryan (see example in Phase 3).

Pollution: In this phase of the scenario, there is no apparent negligence in the handling or disposal of COVID-19-infected waste that would be expected to lead to a pollution liability claim. If such negligence did exist, coverage would depend on the specific wording of the policy. Each carrier's form deviates significantly from their competitors. Careful analysis of each form is required. The definition of "pollution conditions" in most forms uses very broad wording. However, this wording has not yet been tested with a COVID-19 clean-up scenario and it is unclear how the carrier will respond. While certain policies contain specific coverage for Disinfection Costs, this coverage is often provided only for "facility-borne" viruses or bacteria. COVID-19 would not fit into the definition of a "facility-borne" virus. Therefore, policies structured with this language may preclude coverage. Additionally, certain policies exclude any pollution condition arising out of a communicable disease. Policies with this exclusion may also preclude coverage. Coverage available during the course of Transportation or for Non-Owned Disposal Sites may be subject to the above-mentioned limitations.

Phase 2: Emergency Department

Scenario Phase 2 Description

That evening, Ryan has trouble breathing and seeks help at the local hospital emergency room (ER). Ryan spends 2 hours in the room waiting to be seen. While awaiting the physician, Sandra, an ER nurse attends to Ryan, who is coughing and sneezing to begin rehydrating Ryan. When degloving, Ryan sneezes and

Sandra rubs her tired eyes before washing her hands. Meanwhile, Ken, a pharmaceutical representative who was present in the ER waiting room, has been exposed to infectious material introduced by Ryan.

Exposures

- Droplets from Ryan's coughs and sneezes may be introduced into people's eyes, noses or mouths.
- Professionals, employed and contract staff (e.g., cleaners) are potentially exposed.
- ER may need to close for disinfection process.
- Sandra is exposed to droplets from Ryan's sneezes.
- Medical waste is created.

Potential Insurance Response

Healthcare General Liability: Because Ken, a non-patient/non-employee third party, was exposed to COVID-19 at the ER, he may file a claim against the ER. The insured may have recourse through the general liability policy arising from claims of "bodily injury" or "property damage". (See above for additional detail). In order for the claim to be accepted, Ken may need to establish that COVID-19 was indeed contracted at the ER. This may be difficult due to the dynamics of COVID-19 transmission.

Professional Liability: In this phase of the scenario there appears to be no direct medical incident that would lead to a professional liability scenario; however, a subsequent action involving any part of the chain of care is likely to trigger a claim against all. In general, any error in the rendering of professional services and for which a claim is made will trigger the professional liability policy which may pay amounts resulting from Ryan's / his estate's claim. The policy may cover vicarious liability as well as direct liability. If the hospital participates in any associated clinical trial, coverage is likely limited to the direct patient care. If experimental drug therapy(ies) are employed, provider may have benefit of governmental immunity.

Workers' Compensation (WC): While every jurisdiction has specific laws around WC and communicable disease claims, the general rule is that the injury would be considered compensable only if the employee was considered at a greater risk than the general public.

Absence from work during the quarantine period (prior to a positive confirmation of COVID-19) should be covered under WC even if the employee ultimately tests negative for the illness.

In some states, exposure constitutes the "injury", not the symptoms, which means employees at risk because of their work should be covered by WC during the quarantine/testing period since the exposure to COVID-19 would trigger the WC

coverage and related benefits and not the determination the employee actually contracted the disease.

Employers should consider the quarantine period/monitoring period covered under FMLA and employers should run FMLA concurrent with WC lost time.

EEOC/ADA Exposure: In this phase, Ryan's employer might require he stay home from work or be screened for COVID-19 as part of his company's COVID-19 response protocol.

The Americans with Disabilities Act (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. COVID-19 could fit in one of the exceptions if 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.

Texas Non-Subscription: For Texas employers who are non-subscribers, coverage would apply as described in Phase 1 of this scenario.

Employer's Liability: If Sandra is able to successfully assert that her infection is the result of her employer's negligence, she may sue under employer's liability. If Sandra's spouse, child, parent, brother or sister is infected by Sandra, they could also make a claim through either the employer's or general liability policies.

Property/Business Interruption(BI)/Extra Expense: No coverage available unless:

- Insured has specific Communicable Disease coverage (offered by some insurers)
- Order of an authorized governmental agency prohibits access to an insured location as a result of the enforcement of any law or ordinance regulating the actual not suspected presence of communicable disease. (Generally requires that communicable disease actually be spread beyond the area where disease is normally present and the order is the result of actual and not the suspected spread of a communicable disease.)

Such coverage typically has a low sublimit.

Privacy: There is no apparent breach of privacy in this phase of the scenario.

Pollution: There is no description of improper handling or disposal COVID-19-infected waste at this phase in the scenario and pollution liability coverage would not be expected to apply.

Phase 3: The Hospital Stay

Scenario Phase 3 Description

The ER physician, Kate arrives. She asks about Ryan's travel history and learns that he has been traveling in Hubei Province. In an abundance of caution, Kate admits Ryan into an isolation room of the hospital. There she administers a test and confirms that Ryan has COVID-19. One of the hospital candy strippers hears that Ryan has COVID-19 and also that he has recently flown on a commercial airliner. She talks about this information at home and her nephew posts it on his blog. Ryan spends 10 days in the hospital.

Exposures

- Medical professionals caring for Ryan and staff/contract employees coming into contact with infectious waste are exposed.
- Ryan has a long and expensive hospital stay.
- Ryan misses work.
- Hospital room/ward may need to be shut down for disinfection process.
- Medical waste is created.

Potential Insurance Response

Healthcare General Liability: In this phase of the scenario, there is no apparent negligence that would be expected to lead to a general liability claim. In the case of negligence and subsequent claims arising from non-patient/non-employee third parties (e.g., the parent of a different patient who is also present in the waiting room), the insured may have recourse through this policy arising from claims of "bodily injury" or "property damage" (see above for further detail).

Professional Liability: In this phase of the scenario there appears to be no direct medical incident that would lead to a professional liability scenario; however, a subsequent action involving any part of the chain of care is likely to trigger a claim against all. In general, any error in the rendering of professional services and for which a claim is made will trigger the professional liability policy which may pay amounts resulting from Ryan's / his estate's claim. The policy may cover vicarious liability as well as direct liability. If experimental drug therapy(ies) are employed, provider may have benefit of governmental immunity.

Workers' Compensation (WC): If Kate or any of the hospital employees become infected with COVID-19 after treating Ryan, WC would be expected to apply as described in Phase 2 of this scenario.

Texas Non-Subscription: For Texas employers who are non-subscribers, coverage would be expected to apply as described in Phase 1 of this scenario.

Employer's Liability: If an employee is infected in a work-related incident and claims that the infection is a result of the employer's negligence, they may sue under employer's liability. If a spouse, child, parent, brother or sister of that employee is infected by the employee, they could also make a claim through either the employer's liability or general liability policies.

Property/Business Interruption(BI)/Extra Expense: No coverage available unless:

- Insured has specific Communicable Disease coverage (offered by some insurers)
- Order of an authorized governmental agency prohibits access to an insured location as a result of the enforcement of any law or ordinance regulating the actual not suspected presence of communicable disease. (Generally requires that communicable disease actually be spread beyond the area where disease is normally present and the order is the result of actual and not the suspected spread of a communicable disease.)

Such coverage typically has a low sublimit.

Privacy: The volunteer releases Ryan's name and diagnosis to media – a breach of privacy. If Ryan subsequently sues – the privacy policy is likely to respond. Volunteer also releases the name of airline on which Ryan was traveling. Media associates airline with COVID-19– breach of privacy, defamation, libel, slander. If airline sues – privacy policy is likely to respond.

Pollution: COVID-19-infected waste would be expected to result from Ryan's hospital stay. Conditions resulting in the improper handling or disposal of this waste may be covered by a pollution liability policy. However, coverage will depend on the specific wording of the policy. Each carrier's form deviates significantly from their competitors. Careful analysis of each form is required. The definition of "pollution conditions" in most forms uses very broad wording. However, this wording has not yet been tested with a COVID-19 clean-up scenario and it is unclear how the carrier will respond. While certain

policies contain specific coverage for Disinfection Costs, this coverage is often provided only for "facility-borne" viruses or bacteria. COVID-19 would not fit into the definition of a "facility-borne" virus. Therefore, policies structured with this language may preclude coverage. Additionally, certain policies exclude any pollution condition arising out of a communicable disease. Policies with this exclusion may also preclude coverage. Coverage available during the course of Transportation or for Non-Owned Disposal Sites may be subject to the above mentioned limitations.

Director's & Officers: If hospital mismanagement of a COVID-19 case is alleged to damage the stock price or reputation of said hospital, a director's & officers suit may result.

Stop Loss (Medical & Provider): A reinsurance policy designed to address Cat losses for an individual's medical expenses is available at varying deductible levels. If purchased in advance, pandemic risk exposures can be addressed for multiple events and provide aggregate expense protection.

- **Provider Exposure:** If the healthcare providers have assumed a risk position with the payer for these patients, a provider excess of loss cover may limit their expense for these events.
- **Employer Exposure:** Employers who have purchased a stop loss policy to protect themselves for Cat losses will find this policy may address these expenses as well.

Additional Considerations

- It is important to review the general exclusions to all of these policies to assure there are no references to communicable disease or related acts that would cause the policy to not address this exposure.
- Many healthcare primary and umbrella liability policies are endorsed to afford limited coverage for particular events such as disinfection expense, evacuation expense, medical waste civil fines and crisis response expenses; consult your policy for availability of such coverage.
- During a public health emergency, governments at various levels may grant immunities and protections to the benefit of the general populace. One should keep abreast of all related developments and associated protections.