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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- 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
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:
  - 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
  - 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
elements). 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

• Centers for Disease Control and Prevention
  index.html

• World Health Organization (WHO): www.who.int/
  emergencies/diseases/novel-coronavirus-2019

Disclaimer: This document has been provided as an informational resource for Aon clients and business partners. It is intended
to provide general guidance on potential exposures and is not intended to provide medical advice or address medical concerns
or specific risk circumstances. Due to the dynamic nature of infectious diseases, Aon cannot be held liable for the guidance
provided. We strongly encourage visitors to seek additional safety, medical and epidemiologic information from credible
sources such as the Centers for Disease Control and Prevention and World Health Organization. As regards insurance coverage
questions, whether coverage applies, or a policy will respond, to any risk or circumstance is subject to the specific terms and
conditions of the policies and contracts at issue and underwriter determination.