

COVID–19: Big Picture Coverage Considerations

The World Health Organization declared the COVID-19 Coronavirus a pandemic on March 11th, 2020. In turn, President Trump declared a national emergency over the outbreak on March 13th, 2020. In the following days, we have seen various actions by states and governmental authorities including the shutdown of construction sites. It is hard to determine at this moment the effect the pandemic might have on your projects, however, Construction Risk Partners is approaching this under the assumption that there will be disruption caused by the Coronavirus and want to provide focus on the potential enterprise risks your company has as it relates to insurance, subcontractors, supply chains and contractual exposures. We are ready to assist you with any needs you have during this challenging time.

Insurance Considerations:

Workers' Compensation

Statutory coverage for injuries or occupational diseases arising out of and in the course and scope of work. It is important to note that many state workers' compensation statutes clearly define what an occupational disease is and is not. You will note for the sample of states below that while occupational disease is considered compensable, the Coronavirus will most likely not fit into the definition and therefore not be considered compensable. There are exceptions for certain industries such as health care workers and first responders. If you have a question about a specific jurisdiction, please reach out to you Construction Risk Partners claims contact for additional information.

Pennsylvania WC ACT

(n) All other occupational disease

- (1) to which the claimant is exposed by reason of his employment, and
- (2) which are peculiar to the industry or occupation, and
- (3) which are not common to the general population.

Texas Labor Code

"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.

New York WC Act

Defines occupational disease as compensable if it 'Is the result of a distinctive feature of the kind of work performed by claimant and others similarly employed, not an ailment caused by a peculiar place in which a particular claimant happens to work . . . or caused by ordinary contact with a fellow employee.'

NJ WC Act

Defined to include all diseases arising out of and in the course of employment, which are due in a material degree to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or place of employment.

General Liability

Coverage is provided on a third-party basis and thus only applies when there is a "suit" (or, in some limited cases, a threat of a suit). Coverage may not be immediately available as a result. In the event of a third-party loss, coverage will respond to bodily injury or property damage caused by an occurrence. It is possible carriers may deny coverage based on a lack of property damage, or potentially based on the occurrence requirement.

It is important to look at the exclusions section of your specific policy to determine if your coverage is limited in any way.

- For instance, the standard GL policy typically has a pollution exclusion. This will then point you to the definition of pollutant to determine what is included. If "virus" is not an excluded pollutant, then coverage may be afforded if a claim were made. Look for other broader terms such as contaminant as well.
- Other policies may include communicable disease exclusions, which likely include viruses.

Property & Business Interruption

Most property policies require direct physical loss or damage to insured property. Closures due to threat of or fear of contamination may not trigger coverage. Note for Business Interruption there first needs to be a covered cause of loss in order to trigger this coverage.

However, there may be coverage under "civil authority" provisions, depending on the language, when access to the property is prohibited by governmental authority (e.g., orders to close insured locations – keep in mind this is separate from job site locations covered under BR policies). There would most likely still be the need to show there was a direct physical loss to trigger this coverage.

The exclusions section of the policy will further dictate how coverage may or may not respond. Under the pollution exclusion for a standard property policy, you will again need to look at the definition of pollutant. In some instances, we have found that endorsements on the policy may further expand the definition to include viruses, which is broader than the definition of pollutant. Other policies use the term "contaminant or pollutant" with contaminant not being specifically defined. This broad term is concerning to us.

Builder's Risk

Similar to the property policy discussion above, policies need to be reviewed for expanded definitions of pollutant or contaminant language. If the policies have this type of broad exclusion typically found in BR coverage, the policy may not respond to owner's claims for loss of use/rents.

Contractor's Pollution Liability

Some policies may contain an exclusion for "microbial substances," which is defined to include viruses. There is the potential the policy has been specifically endorsed to give back this coverage. If this is the case, coverage may be available under this policy, if a claim should arise related to this coverage type.

Cyber/Social Engineering

With an increase in employees working from home during this time, it will be important to review cyber coverage to confirm how policies may respond to networks being infiltrated. Remind employees to use secure WIFI networks and use increased vigilance in uncharacteristic requests for such things as wire transfers.

Employment Practices Liability

This coverage is designed for employers who are alleged to have made some type of wrongful act against an employee for items such as discrimination, violations of the ADA, etc. Following your company's standard practices related to employment will be key during this time. For instance, if you are subject to FMLA, and an employee requests this type of leave during the outbreak, determining if the employee is eligible and then administering as required will be key to prevention of a later claim. If a claim for loss results under this coverage related to the Corona Virus, this coverage should respond.

Professional Liability

Coverage is generally provided on a third-party basis, so may not be immediately available.

Coverage must be tied to the insured's provision of or failure to provide professional services. Depending on the nature of the business or work, this may or may not apply to COVID-19 claims.

Subcontractor Risk:

Subcontractor Default Insurance (SDI) and/or Subcontractor Bonds

Subcontractor Default Insurance (SDI) and/or Subcontractor Bonds continue to be an effective tool in mitigating subcontractor risk.

- This coverage is for the financial impacts associated with subcontractor default.
- Both bonds and SDI cover the terms and conditions of the underlying subcontract agreement, which most often includes scope, schedule, and price. We expect there to be project schedule disruption associated with the pandemic. This may come in the form of supply chain disruption, project shut down, and/or production challenges associated with labor shortages.
- The impact of the above can be overall project delay leading to disruption in follow on trades and/or contractual damages.

- As discussed above, force majeure clauses may provide some schedule relief (often not financial relief). In addition, there may be an opportunity to evaluate the project schedule and re-sequence in an effort to avoid critical path delay.
- However, in the absence of contractual relief, SDI and performance/payment bonds should offer some coverage in the event a subcontractor is unable to meet its contractual obligations.
- As these situations arise, we encourage you to reach out to us early to discuss strategy and options.

Contractual Responsibilities

Since much of the protection and exposure starts with your *contractual responsibilities*, it is prudent to thoroughly review your contracts with Owners and downstream subcontractor and supplier contracts. This will help determine if contractual relief is available within the project documents. Special emphasis should be placed on the following:

- Review existing contracts for Force Majeure/Excusable Delay clauses. Determine the breadth of language and whether or not it provides relief for delays created by acts beyond the Contractor's control.
- Does the Force Majeure clause identify "unusual delays in delivery" as an excusable delay providing some protection from supply chain disruption?
- How do contracts address suspension of work and your ability to terminate after a period of stoppage? For example, the AIA A201 affords Contractors the ability to terminate and provides recovery of payments for work performed and reasonable overhead.
- Possible remedies for Contractors may include additional time, and possibly additional compensation on a particular project.
- It is critical to understand the notice provision within the contract with Owners as it relates to Force Majeure, Termination and potential Change Orders. Failing to file a notice in a timely manner could time bar an otherwise valid claim.
- Even if there are no known impacts today, we suggest considering a written notice to the Owner indicating that the World Health Organization identified the COVID-19 outbreak as a pandemic on March 11th and this event could result in potential delays and additional costs that are outside the Contractor's control. Then as the impacts become better known, contractors will be able to document the details in their claim.
- Be vigilant regarding your understanding of project financing and adequate funding for delays.

Every situation is different as are contracts, subcontracts, and insurance policies. The preceding provides some guidance and best practices to navigate these challenging times. As always, we encourage you to reach out to any member of the CRP Insurance, SDI or Surety team with questions.