

# COVID-19 SUMMARY

## SPECIALTY RISK LINES

### Employment Practices Liability (EPL)

- In addition to State law issues, Federal responsibilities continue to exist under employment law in the midst of this crisis.
- ADA requirements for reasonable accommodation for those with chronic health conditions including existing conditions making them more susceptible to the virus.
- FMLA rules requiring up to 12 weeks of unpaid leave to take care of family members/themselves.
- FLSA compliance must be documented if non-exempt workers are allowed to work from home.
- NLRA, Workers Compensation, and OSHA (including new OSHA COVID-19 standards) must be adhered to.
- Discrimination or wrongful termination of employees or applicants for employment based on actual or perceived exposure to COVID-19 should be scrutinized.
- Additional pressure on businesses to layoff or furlough employees due to the pending economic downturn will add substantial legal risk to organizations.
- New Federal statutes in response to the crisis such as the Emergency Family and Medical Leave Act (EFMLEA) and Emergency Paid Sick Leave Act (EPSLA) should generally be covered subject to comments below.

### Coverage Hurdles

- Most EPL policies cover State, Federal, and common law claims for a wide range of wrongful termination, discrimination and harassment demands brought by past, present or prospective employees including in many cases other third parties for discrimination and harassment; BUT:
- EPL policies generally only cover defense costs for ADA claims (not the costs of the actual accommodation itself).
- FLSA and related wage/hour claims are generally limited to defense costs only sub-limits between \$100k-\$250k on private company forms and generally only available as a separate product for public companies.
- OSHA, COBRA, NLRA, worker's compensation, and WARN Act (plant closing notification) allegations are generally excluded.
- There are variations in the scope and breadth of bodily injury and property damage exclusions. A well negotiated EPL policy should have the preamble to its bodily injury and property damage exclusion worded using "for" language instead of "based upon, arising out of, in connection with" (absolute). In addition, the bodily injury exclusion should have additional exceptions for emotional distress, mental anguish, humiliation, and loss of reputation.

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# COVID-19 SUMMARY - SPECIALTY RISK LINES

## Directors & Officers Liability (D&O)

Conceptually, multiple stakeholders in companies may bring claims alleging that directors and officers breached their duties of care, loyalty, and obedience to the organization for mishandling the crisis causing such stakeholder financial harm. These claims can be brought by shareholders, creditors, regulators, employees, or other third parties.

### Public Company and Financial Institutions -

- This is primarily a disclosure issue for publicly traded companies.
- COVID-19 risk including indirect supply chain risk may need to be disclosed in public filings including as Risk Factors, MD&A and even footnotes to financial statements.
- Forward looking statements provided to investors are still subject to the '34 Act Safe Harbor rules but must be revised immediately if circumstances change.
- There have been over 2,000 10-K related mentions to COVID-19 in public filings thus far.
- There have been a couple of stock-drop ('Event-Driven') D&O lawsuits arising out of the crisis, however, it is not widely believed that we will see a rash of this litigation given that the plaintiffs still need to demonstrate scienter (intent) and that the market capitalization losses may not be substantially different from the market as a whole to ultimately quantify damages.
- SEC issued an order 3/4/2020 giving public company filers 45-day extensions under certain conditions.
- SEC enforcement is still active: recently enforced temporary trading suspensions in Aethlon Medical and Eastgate Biotech over COVID-19 treatment claims.
- FINRA has suspended all in-person mediation and arbitration hearings through 5/1/2020.

### Private Company -

- Private companies are not immune from allegations from stakeholders over allegations of mismanagement, lack of compliance oversight and regulatory enforcement.
- We anticipate that there will be a spike in bankruptcies which adds significant probability of D&O litigation since in such cases suing the directors and officers personally may be the only form of financial recourse by unsecured creditors.

## Coverage Hurdles

- D&O policies have wide variations in the scope and breadth of bodily injury and property damage exclusions. A well negotiated D&O policy should have the preamble to its bodily injury and property damage exclusion worded using "for" language instead of "based upon, arising out of, in connection with" (absolute). In addition, the bodily injury exclusion should have additional exceptions for securities claims and A-Side (non-indemnifiable) claims.
- Additional coverage hurdles may revolve around claims in bankruptcy relating to policy structure, allocation, creditor committee, debtor in possession and waiver and release of automatic stays.

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## Data Security/Privacy (Cyber)

Cyber criminals will be taking advantage of companies' distraction right now making breaches more likely. Malware and hacker incidents are already on the rise. Employees will be taking files home and may lose sensitive data. IT resources are being stretched potentially causing gaps in network cyber security. Remote networks may not be as secure allowing more breaches or accidental loss of data due to employee error as they adjust to their new workspaces. The sheer volume of potentially sensitive personally identifiable, protected health or other confidential data being exchanged remotely is likely to result in more losses than before.

## Coverage Hurdles

- Well negotiated standalone Cyber insurance policies will generally provide robust coverage for not only defense costs and indemnity resulting from third party liability claims alleging network security liability and privacy violations, but will also provide coverage for business interruption, extra expense, ransomware payments, and crisis management costs (Initial legal consultation, IT forensics, public relations, credit monitoring, and post-breach remediation services).
- There are variations in the scope and breadth of bodily injury and property damage exclusions. A well negotiated Cyber policy should have the preamble to its bodily injury and property damage exclusion worded using "for" language instead of "based upon, arising out of, in connection with" (absolute).
- Note that most Cyber policies will also contain absolute exclusions for seizure, confiscation, nationalization, requisition or destruction of property by a domestic or foreign governmental authority should this become the case for an insured.
- While there are no indications at this time that the COVID-19 outbreak was State sponsored, Cyber policies will generally include absolute War exclusions and in some cases, Terrorism exclusions. Even exclusionary exceptions for 'Cyber-Terrorism' would not apply to 'Bio-Terrorism'.

## Crime

Crime losses are expected to increase for a variety of reasons including procedural distraction, inability to follow previous internal control mechanisms, financial desperation by individuals (as seen in 2008), increased use of mobile devices, virtual closings requiring broadened use of electronic wire transfers, social engineering and phishing schemes.

- SEC, FINRA, and FINCEN have warned organizations to be on the lookout for Ponzi schemes, insider trading violations, pump & dump schemes, deep-fakes, fraudsters impersonating governmental officials/agencies and COVID-19 related investment scams.
- We have already seen an uptick in malware/ransomware attacks and business email compromise (BEC) schemes.

## Coverage Hurdles

- The breadth of coverage under Crime insurance policies vary significantly on an account by account basis. A well negotiated policy should have coverage for not only employee dishonesty, but also for money/securities on the premises or in transit, forgery, computer fraud, and electronic funds transfer fraud.
- Social engineering/deception fraud is also available in the market to address BEC losses although this coverage is generally sublimited to no more than \$250,000 unless part of a layered program.

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## Fiduciary Liability

It is likely that employee benefit plan participants will focus their attention on investment manager fees and expenses more than ever given the significant market losses in their 401(k) plans. In addition, general plan investment performance relative to alternatives will be in the spotlight. For defined benefit plans, funding status may turn negative putting further financial stress on those sponsors. Distracted and remote HR functions may lead to increases in administrative errors. For these reasons, it is possible that we may see an uptick in ERISA litigation and administrative E&O complaints.

## Coverage Hurdles

- Fortunately, most Fiduciary Liability policies have a “for” preamble to their bodily injury and property damage exclusion(s).
- Coverage is limited to ERISA liability (and foreign equivalents) and COBRA administrative E&O. It will not extend to workers compensation, OSHA, NLRA, FLSA, or the WARN act.
- Managed Care E&O and HIPAA fines and penalties need to be affirmatively added to the policy which is especially important to those companies that self-insure welfare benefit plans.

## Transactional Risk

The global M&A market has come to almost a complete stop in reaction to the COVID-19 crisis. Due to the current and projected short term (and long term) business conditions, including instability in the global banking and credit markets, and significant slowdown in economic activity, valuation models have been turned upside down for buyers and sellers. Even deals that have already been signed are generally being extended or in some cases terminated using material adverse event (MAE) clauses or force majeure contract provisions.

- We have already seen COVID-19 exclusions introduced in representations and warranties (R&W) insurance policies and at the very least, it is being identified as an area of heightened underwriting risk which will require extensive due diligence.
- Insurance due diligence will take on significantly more importance if/when M&A market conditions improve. The importance of catastrophic insurance risk capital assets of companies has been underscored during this crisis.
- Extensive due diligence will be required around the following areas:
  - \* Insurance assets of the target company
  - \* OSHA compliance
  - \* Material contracts – force majeure provisions
  - \* Contingency plans
  - \* Business continuity plans
  - \* Privacy, cybersecurity, breach response plans

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