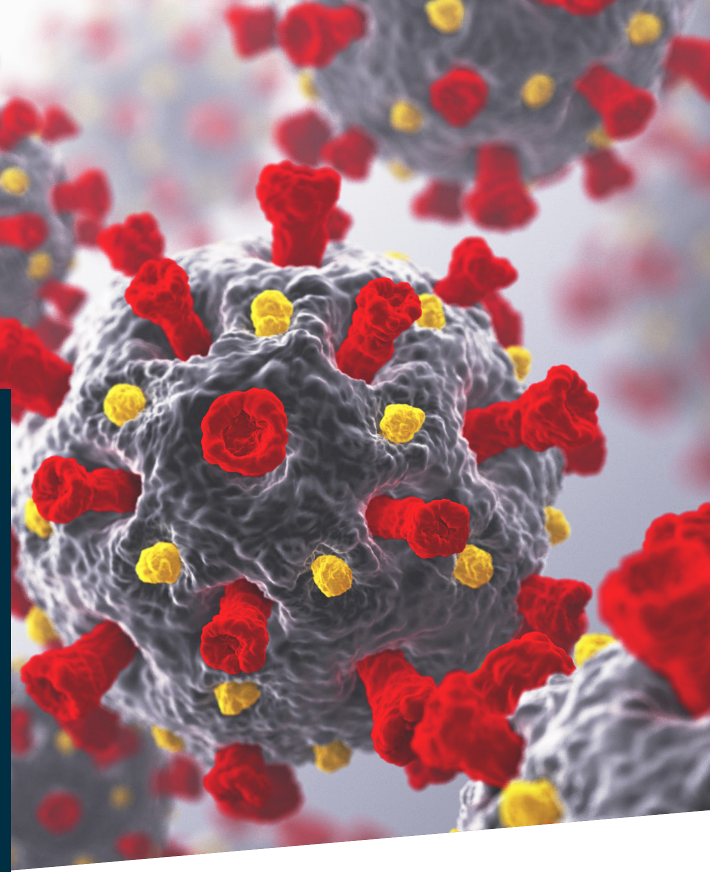

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Impact of COVID-19 on Executive Risk Coverages

There continue to be unknowns regarding the recent outbreak of COVID-19 and it is important to ensure your business has taken precautionary steps to shield itself from potential exposures that could arise. As of today, we are still uncertain of how the broader insurance market will respond to COVID-19 related claims. With that said, it is crucial for all enterprises to be aware of the current exposures organizations could face, and subsequently assess all risk management strategies and solutions. Now is the time to evaluate business continuity plans and inquire further about current risk transfer solutions.

As all industries look to adapt to the changing landscape, underwriters of management liability are no different. Underwriters are scrutinizing every business sector, but these seven sectors are attracting heightened attention from insurers. Industries experiencing the most fallout at present include:

1. Retail
2. Energy/Oil & Gas
3. Hospitality (including restaurants)
4. Transportation/Aviation
5. Entertainment
6. Healthcare
7. Financial Services

On the next few pages we look at the different exposures specific to Executive Risk coverages.

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Directors & Officers Liability

Additional focus is being placed on cash flow and sustainable liquidity for all businesses (e.g. potential for bankruptcy). Areas receiving additional focus are:

- **Business continuity/disaster recovery plans**
  - **What redundancies in place and how fast they can be activated**
  - **When was the last time these plans were stress tested? Is a pandemic outbreak considered in the testing?**
- **Supply chain**
- **Product/raw materials stockpiles**
- **Customer mix**
  - **Are key customers facing liquidity issues?**
- **Cash on hand to sustain operations**
- **Asset diversification**
- **Credit facilities and related maturity dates**
- **Has the organization's financial wherewithal been stress tested recently?**

The management liability marketplace was already experiencing a hard market and the global pandemic has caused further tightening by insurers, while also likely pushing the end of this market cycle further out. For some of the sectors above, certain markets are no longer considering new business while others are drastically reducing limits on existing policies, more now than was expected coming into the year. Self-insured retentions that were increased last year are being increased again, as underwriters fear a new wave of claims related to the pandemic. However it is important to note, we have not seen any market universally add any exclusionary language relating to the COVID-19 outbreak.

Expected Claim Scenarios

Whether clients are publicly traded or privately held, the types of claims we are anticipating include:

Direct Shareholder/Limited Partner Claims -- COVID-19 related shareholder claims have already been brought against Norwegian Cruise Lines and Inovio Pharmaceuticals. In a continuation of the "event driven" litigation trend from 2019, we can reasonably expect additional claims to be filed against both public and private companies/partnerships.

Further, the U.S. Securities Exchange Commission ("SEC") has now issued disclosure obligation guidelines for many public companies, and even for private securities offerings documents. It is imperative that companies review these guidelines carefully with outside counsel to ensure proper decision making strategies are enacted to mitigate exposure to future shareholder claims in response to both known, and unknown outcomes. This will be a key area to monitor as a potential source of claims in the future.

Derivative Shareholder/Limited Partner Claims -- It is possible, if not probable, that plaintiffs' firms will bring claims against corporate boards on behalf of the company alleging their collective failure to properly prepare the company for an epidemic/pandemic event. Derivative litigation has been on the rise in recent years and is often brought following an 'event', just like direct shareholder litigation.

Regulatory Action -- The United States Department of Justice has already declared it will aggressively pursue investigations of companies that have been alleged to engage in price gouging. It is likely that additional regulatory bodies (e.g. Federal Trade Commission) will take up the cause to investigate corporations and their directors and officers if allegations of improper conduct emanating from these unusual times are made against them.

Short Term Outlook

If terms have been offered, and are generally agreed as acceptable, we strongly urge our clients to bind cover as soon as practicable. Although instances are few and far between, some insurers have been adjusting previously offered terms under the premise that the pandemic equates to a material change in risk and/ or exposure, thus allowing them to reassess terms offered in quote letters. As previously mentioned, some insurers are not taking on new clients in certain industry sectors because of what they expect to be continued financial deterioration of the segment overall. In the next two to four months, we are expecting carriers to seek an additional 10% -15% of rate, on average, above standard renewal premiums; which were already going to be elevated due to the hardening market conditions that preexisted the pandemic. The relative degree of each increase will depend on an insured's industry, loss history, current stability and future prospects. As buyers begin to more fully absorb their particular financial impact, renewals falling in the 2nd half of the calendar year may be more harshly judged, depending on the number of COVID-19 related claims that are being filed.

Employment Practices Liability

An EPL policy's relation to the COVID-19 crisis will likely get tested in several areas. Generally speaking, there are no pre-existing, specific or direct exclusions at this time. In 'normal' economic downturns, the filing rate of claims alleging wrongful termination, workplace discrimination and/or harassment increases. As companies have already taken drastic measures to reduce workforces, enact furlough policies for workers or outright close their businesses, these types of claims are expected to be filed in bulk.

Most EPL policies expressly cover these perils with some degrees of variation depending on a specific insured's risk profile. However it is worth noting, that all EPL policies have some form of bodily injury exclusion; and this exclusion may be invoked by a carrier as an illness may be interpreted as a bodily injury. It is important to mention that policies differ with respect to treatment of the bodily injury exclusion. EPL policies either contain an absolute exclusion or a contingent exclusion. The absolute exclusion, as noted by "arising out of" wording, may pose a coverage issue for claims implicating COVID-19. The less stringent contingent wording, noted by a "for" preamble, may allow for a more favorable interpretation of coverage.

In either case, COVID-19 claims may impact coverage in otherwise covered areas such as harassment and discrimination.

Another arena of potentially heightened litigation lies in the regulatory space. COVID-19 claims may involve several governmental agencies. For example, should an employer close its operations, the Workers Adjustment Retraining Notification Act (WARN) may apply. In a dispute over wages, the Fair Labor Standards Act (FLSA) may apply. EPL policies typically exclude WARN act claims. As respects FLSA, policies differ but some offer sub-limited defense cost cover. Other statutes such as the Americans with Disabilities Act (ADA) and OSHA may come into play in claims that include COVID-19.

The Families First Coronavirus Response Act (FFCRA) act is creating immediate guidelines that corporations with over 50 employees and under 500 employees must follow regarding paid sick leave and certain allowances for child care while employees adapt to the impact of the pandemic.

The definition of 'essential' businesses may come to have an impact on the EPL marketplace in some ways. Grocery stores can be used as an example. States that have instructed all nonessential businesses to close, have deemed grocery stores as essential businesses and thus can remain open. Some employees may feel that their workplace is unsafe due to the potentially heightened risk of infection. Any employee that feels he or she is 'forced' to show up to work in the face of this pandemic may file a claim alleging harassment and/or a hostile work environment.

Underwriters are asking additional questions to ascertain their exposure to these and other potential claims arising out of the COVID-19 outbreak. Some examples include:

- **Are layoffs being contemplated?**

  - If yes, will severance packages being offered?
- **What is the company policy regarding telecommuting?**

  - Are those not able to work from home being paid?
- **What is the organization's policy towards sick leave?**

Expected Claim Scenarios

When we look back at this period of time, we expect to see a rise in total claims filed by allegedly aggrieved employees. The claims made will likely include the traditional allegations of:

- **Wrongful termination**
- **Harrasment**
- **Discrimination**
  - **Potentially 3rd party discrimination claims filed by customers at essential businesses that feel they were discriminated against because they were exhibiting symptoms consistent with COVID-19**
- **Hostile work environment**
- **Workplace retaliation**
  - **Possibly filed after a return to work by staff that opted to not work during the pandemic crisis**
- **Failure to pay proper wages**

In most claim scenarios with COVID-19 ramifications, the EPL policy will operate under a 'business as usual' approach with careful attention placed on the bodily injury exclusion and the extent of regulatory coverage available.

Short Term Outlook

Similar to the D&O market, any EPL terms offered now may not be available in the future for industries more impacted than others by the outbreak of the novel coronavirus. A firming market for large risks or those with heavy concentrations of employees in California has accelerated. Retentions are expected to increase in both the short and long term. As of now, we do not anticipate standard markets adding a COVID-19/pandemic exclusionary language to any policies. Certain carriers are attempting to add exclusions relating to reductions in force which, nominally, has the same effect.

Fiduciary Liability

While claims directly attributing the pandemic are less likely to hit fiduciary liability policies, there are claims that could tangentially be made. There may be a spike in claims made against plan fiduciaries that have a heavy reliance on corporate equities and plans that have a lack of optionality within 401(k) plan portfolios. These types of claims can be filed at any time, however they may become more frequent if plaintiffs' attorneys see an opportunity.

Similarly, an uptick in excessive fee claims made against plan fiduciaries has been seen. It is not a stretch to argue that any excessive fees paid to third party plan administrators could have been used as a buffer against corporate layoffs.

As plan fiduciaries are bound by the Health Insurance Portability and Accountability Act, any erroneous or negligent disclosures in employee communications could trigger liability under HIPAA. In certain applications, elements of such claims could be covered by a fiduciary liability policy.

Fiduciary Liability insurance underwriters are also asking additional questions to evaluate their exposure to claims arising out of pension trust liability type wrongful acts related to action taken in response to the COVID-19 outbreak. Some examples are:

- **Were employer match components of 401k Plans reduced or eliminated?**

  - If yes, what was the process for approving this change and advising the participants?
- **How many alternative investment options were offered to participants in 401k Plans?**

  - Are those not able to work from home being paid?

  - How often were the fees for plan administrators assessed?
- **For Pension Plans, will the funded status of the Plans change or be amended as a result of financial hardship suffered due to the pandemic?**

  - Will the future ability of the Company to funds plans be impacted by the outbreak?

Short Term Outlook

No meaningful impact on the broader fiduciary liability marketplace is anticipated at this time. If claims that are directly correlated to the global pandemic are filed en masse, the market will change. Overall, that is not foreseeable. As fiduciary liability is often purchased either in conjunction with a D&O policy or on the same anniversary date, renewing cover on an expedited basis is recommended.

Cyber Liability

Circumstances related to the pandemic do not create any immediate liabilities for buyers of cyber liability insurance. There may be, however, a rise in liability payments in the future resulting from an increase in hackers attempting to be criminally opportunistic during these difficult times. Prior to the pandemic, ransomware incidents had already been increasing in frequency and severity and it is expected that additional ransomware attempts may be launched during this time of crisis.

Underwriters of cyber liability already seek out information regarding an insured's security posture and what their disaster recovery plans are if all else fails. Thus the questions being asked by underwriters are unlikely to be augmented dramatically by any pandemic-specific questions. One area where additional questions are likely is in the broader healthcare industry. Strict adherence with patient confidentiality guidelines is liable to be strained by the overwhelming volume of cases. Additionally, any third party SaaS providers will also face increased scrutiny regarding their software's capabilities and overall security in a high traffic environment.

While it's unlikely that a COVID-19 claim would directly trigger a cyber policy there are other points to consider with respect to a company's risk profile and how to prevent claims during the time of the pandemic:

- **Working from home** - As the virus spreads and more companies advise their workforce to work from home, employees should stay vigilant when it comes to opening emails and attachments from unknown sources.

- **Fraudulent Wires** - In ways similar to, but sometimes different from, crime insurance, a cyber policy can be triggered through an attempt to fraudulently change wire instructions. Attempts to do so may not only reroute banking information but may allow hackers to access corporate networks.

- **Insurance-Specific Scams** - With a rise in phishing emails posing as COVID-19 alerts, it is not only important for employees to be aware and be cautious, but equally important for a company's security enterprise teams (either in-house or outsourced) to be up-to-date with antivirus and monitoring tools. Security teams are now dealing with a workforce using personal computers, which can be a weak point compared to enterprise level computers.

- **IT Security** - There is a potential increase of insurance-specific scams posing as solutions to dealing with risks coming from COVID-19. Companies should contact their insurance broker prior to changing terms of current policies.

- **Business Continuity** - IT infrastructure is now under the burden of the increase in traffic caused by work-from-home employees accessing virtual private networks (VPNs) and other remote log-in capabilities. Companies should have comprehensive incident response and business continuity plans in place that have been tested.

Cyber Insurance may have a more direct role to play in the challenges of current business operations changes due to COVID-19 in the event of a network disruption, where a cyber policy can cover business interruption losses (both direct and contingent) and computer forensics costs associated with investigating a network outage or deterioration of operability.

Short Term Outlook

Restrictive covenants being added to cyber policies at this time is not anticipated. The market remains flush with capacity. Market forces that are expected to impact underwriting decisions in 2020 remain unchanged. If anything, SMEs may find it harder to obtain comprehensive coverage at competitive prices as insurers look to gain market share with larger, more sophisticated buyers. Smaller insureds being more likely to layoff workers may become more susceptible to cyberattacks if their network security posture suffers as a result. At this time, renewals should expect an additional 2% to 5% of rate due to the coronavirus outbreak.

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