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COVID-19 Best-Practices Risk Management Checklist:

In these unprecedented times, businesses are facing potential losses that raise a myriad of coverage issues. While there is never a guarantee any claim will ultimately be covered, there are certain best-practices to follow to put yourself in the best possible position when making an insurance claim.

- **Analyze the language of all insurance policies**

The initial step is evaluating what policies may respond to the different risks created. As language in policies can differ, this is important to determine the best path in pursuing insurance coverage. Do not rely simply on general language referenced in news articles, newsletters, or on the Internet, as that language may not be applicable to your particular claim. For example, some policies have Virus Exclusions and others may have specific grants of coverage (perhaps sub-limited) for these types of losses. Policies are interpreted as contracts, so the language of the insurance policy at issue is going to be a key factor.

As an example, the following policies may be implicated by COVID-19 claims:

- *First-party Property/Builder's Risk*: These policies could potentially provide Business Interruption, Civil Authority, and/or Extra Expense coverage for losses associated with work stoppage or slowdown but will likely require that the stoppage or slowdown result from direct physical loss or damage to covered property or nearby property.
- *Contingent Business Interruption or Supply Chain Risk Insurance*: These policies generally provide coverage for disruption of supply chains of providers, and, potentially, markets in which you operate your business. These policies also may require some form of direct physical loss or damage to property.
- *Commercial General Liability Insurance*: These policies provide liability coverage for claims by third parties where damages are alleged for bodily injury or property damage.
- *Directors & Officers Liability, Errors & Omissions Liability, and Professional Liability Insurance*: These policies would respond to liability claims made against directors or other management alleging that they failed to respond to or failed to take appropriate measures to protect the business, employees, or third parties from the risks associated with COVID-19.
- *Event Cancellation Insurance and Travel Insurance*: As would be expected, these specialized policies potentially cover risks and costs associated with cancellations of events and/or travel. Some of these policies may not have a requirement for direct physical loss.

- *Employer's Liability and Workers' Compensation Insurance*: These policies would potentially protect the company against claims by employees for injuries related to COVID-19 exposure.

This is not an exhaustive list, but rather a reference to the types of policies that may be implicated by a COVID-19 related claim.

- **Provide timely notice to the carriers and cooperate during the claims investigation**

If there are *any* losses anticipated, it is important to provide notice to the carrier. Prompt notice will preserve your claim. It is possible that the carrier will issue a “soft” denial, asking for more information. By tendering promptly, the insured will avoid a late notice defense. In providing notice, the narrative will be important. The way the claims are presented can maximize the chances that the claim will be covered by the particular policy. In some cases, it may be prudent to seek assistance from experienced counsel to tender the claim properly. Of course, keep all records of communications with the insurer and make sure to cooperate with the carrier—to the extent possible—during the investigation of the claims.

It is also important to maintain dialogue with brokers. The brokers likely have connections to the carriers and intimate knowledge of the risks facing your business. The brokers may be able to assist in providing the correct narrative and submitting a claim in a manner that best positions the claim in a way to maximize any recovery. Please understand, however, that communications with brokers may not be protected by attorney-client or work-product privilege. Thus, it may be beneficial to develop a common interest agreement or try to direct many communications with the broker through coverage counsel.

- **Analyze role of and contracts with subcontractors, suppliers, and vendors**

It is important to also review and analyze the various contracts you have with subcontractors, suppliers, vendors, etc. to determine (1) the role those parties play in your business and (2) whether those contracts provide any protection in the event of a loss.

In analyzing the role of subcontractors, suppliers, vendors, etc., you can analyze what would happen should a certain provider be forced to limit or shutdown business. This can also allow you to evaluate whether there is any need to mitigate any potential loss caused by a limit or shutdown of a provider. You may also have certain rights and protections under your contracts with those subcontractors, suppliers, vendors, etc. that can help offset losses due to COVID-19. To this extent, you may have liability insurance available through a policy issued to a provider, depending upon the nature of the claim made involving COVID-19.

- **Record all known, suspected, or potential exposures and presence of COVID-19**

Given the potential losses, it is very important to document in as much detail as possible any known, suspected, or potential exposures to COVID-19 at any job site, office location, and in all workplaces. The more details, the better. Best practice is to create a formal procedure that captures the date, time, location, and facts of the known, suspected, or potential exposure.

- **Record losses, damages, costs, expenses, and loss/limitation of use of property related to COVID-19**

In making any claim for coverage, the insurer will require records of all losses. As such, it is important to document all forms and types of losses, damages, costs, expenses, and loss/limitation of use of property in any way related to COVID-19. This would include both the company's property and assets as well as property and assets of subcontractors, suppliers, and vendors. It is also important to record and document any exposures that your employees may have to COVID-19 in the event of potential workers' compensation or employer's liability claims. This includes documentation associated with required reductions in the workforce, including layoffs, furloughs, and reductions in salary.

Given the nature of these losses, one key component will be that of expenses associated with any cleaning/disinfecting of property; time that facilities are actually shuttered due to COVID-19; and quantifiable lost profits or lost opportunities due to COVID-19. Note, where possible, if any of these costs, expenses, and losses are due to orders issued by governmental authorities. Many policies also require mitigation of damages, so keeping track of any efforts and costs in doing so will assist in making claims. Taking mitigating action will also remove arguments by the carrier that the insured failed to comply with those requirements for coverage.

In this regard, many policies require that the insurer consent to any action by the insured to incur costs or settle pending disputes. Thus, maintaining an open line of communication with the carrier on these issues is key to avoiding a dispute later with the carrier.

- **Monitor COVID-19 legislation, governmental orders, and lawsuits**

One of the more unique aspects of the COVID-19 pandemic is that various states have proposed legislation that would potentially affect coverage for COVID-19 claims. Whether these statutes will ultimately withstand judicial scrutiny is another matter. Regardless, changes in legislation may bolster claims for coverage for losses resulting from COVID-19. Likewise, it is important to keep updated on any governmental orders issued in locations where your company operates. To this extent, it is important to also be informed of governmental orders in locations where your subcontractors, suppliers, and vendors operate, as those orders could ultimately impact your business. Finally, litigation has already begun in many jurisdictions on coverage issues created by COVID-19 claims. It is important to monitor that litigation to get a better understanding of how courts are evaluating similar claims.

IF YOU BELIEVE THAT YOUR COMPANY IS GOING TO SUFFER A BUSINESS INCOME OR SOME OTHER POTENTIALLY INSURABLE LOSS RELATED TO COVID-19, IT IS ESSENTIAL THAT YOU DOCUMENT YOUR CLAIM AND PUT ALL POTENTIAL CARRIERS ON NOTICE OF THE LOSS SO AS TO COMPLY WITH THE REPORTING REQUIREMENTS OF THE POLICIES.

PLEASE REACH OUT WITH ANY QUESTIONS THAT YOU MAY HAVE.

STAY SAFE AND HEALTHY.

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