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Coronavirus (COVID-19) Insurance for Companies Facing Employment Claims

The coronavirus pandemic has left employers with many legal questions during this challenging time. With employers making decisions regarding employee safety, remote working arrangements, and how to handle business disruption and potential layoffs, companies are asking if their insurance policies will respond to employment-related claims. Below is a brief overview of potential employment claims, how a company's insurance policies may respond, and a checklist for what companies should do now.

Coverage for Mass Layoffs/Furloughs

Employment Event/Crisis Coverage

Many employment practice liability insurance policies (EPLI) and directors and officers policies (D&O) provide coverage which businesses can access to assist them with costs associated with significant layoffs. Often called "employment event coverage" under EPLI policies or "crisis coverage" under D&O policies, this coverage is usually written to apply in the event a company lays off or terminates 10-20% of its workforce and generally does not have a retention. The coverage is usually limited between \$50,000 and \$250,000 and may cover costs incurred for media relations firms, security, mental health professionals, and legal expenses to:

- Advise the company with respect to minimizing potential loss or liability associated with the layoff
- Retain an independent security consultant or for independent security guard services
- Manage or administer disclosures to clients, customers, suppliers, investors, or the public regarding the layoff
- Provide counseling to affected employees

Wrongful Termination

EPLI policies generally cover wrongful termination, retaliation, and discrimination. However, there are explicit exclusions for violations of the Worker Adjustment and Retraining Notification (WARN) Act, and similar state laws. It is imperative for companies considering significant layoffs to work closely with employment counsel to ensure legal compliance with any contemplated layoffs.

Coverage for Bodily Injury

Claims for Coronavirus Allegedly Acquired in the Workplace

Workers' Compensation Policies: May apply to claims that coronavirus was acquired in the workplace. Generally, workers' compensation policies require that the illness "arise out of or in the course of employment." Thus, causation will be key. Coverage for first responders, including healthcare workers, will likely be available under workers' compensation policies. A case can also be made that employees in the transportation industry,

hospitality industry, and retail industry, along with employees who were forced to travel to hot spots such as China or the Seattle area at the beginning of the U.S. crisis, have coverage under these policies. Cases will be fact-specific and will turn on whether causation can be proved (i.e., employees will need to prove they contracted the virus at work and not in the community). In addition, states are working on legislation that will expand workers' compensation to those affected by coronavirus so companies should continue to evaluate this coverage as the crisis unfolds.

General Liability Policies: May apply to bodily injury claims alleging the following:

- The company's negligence led to the exposure and infection of customers/clients
- Product liability for air systems in public places or transportation carriers
- Restriction of movement (quarantine)
- Failure to properly plan for a pandemic
- Failure to warn of known danger

Employer Liability Policies: May apply to bodily injury claims not compensated by workers' compensation or claims from family members who contract the virus from an employee.

Coverage for Family and Medical Leave Act (FMLA) Violations, Wage-and-Hour/FLSA Claims, and Safe Workplace/OSHA Claims

Wrongful Termination/Retaliation Claims

While EPLI policies typically contain explicit exclusions for violations for FMLA violations, wage-and-hour/FLSA claims, and safe workplace/OSHA claims, there is usually a specific coverage carveout for wrongful termination based on retaliation. Thus, companies may have coverage for claims for an employee who asserts he/she was fired because they:

- Were forced to work in unsafe conditions (exposure or suspected exposure to coronavirus in the office)
- Took family medical leave to assist family members recovering from the coronavirus
- Were forced to work from home, change their hours, or quarantine in place

Defense Costs

Some policies may have defense cost coverage for these claims even if indemnity coverage is excluded.

Checklist for What Employers Should Do Now

- Carefully review their insurance policies and work with insurance counsel to create a list of potential coverages available for the coronavirus based on the explicit language in their company's policies. Insurance policies vary significantly and companies should not rely on general advice based on type of policy.

- Review contracts with their suppliers, vendors, and customers and determine whether their company is an additional insured under any insurance policies. If so, they should review those policies for potential coverage and add the policies to the list of potential coverages available.
- Document in as much detail as possible any known or suspected exposure to the coronavirus in the workplace. Create procedures to document exposures with the date, time, location, and all known circumstances. Facts will be critical in any coverage disputes.
- Provide notice to their insurance companies in accordance with the terms of the policies under both their company's policies and any policies where their company is an additional insured. Notice requirements are strictly enforced, and policyholders often lose coverage by failing to notify in accordance with policy terms.
- If their company's insurance policies are up for renewal, provide "notice of circumstances" for possible coronavirus related claims under the expiring policies. Their company's renewal policies will most likely have specific coronavirus exclusions.
- Stay informed on changing regulations in states regarding workers compensation requirements. Multiple states including Washington, New York, and New Jersey are already working on legislation that will expand workers' compensation coverage for coronavirus claims.

Companies reviewing their coverage are advised to consult with trusted counsel.

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