
ERRORS & OMISSIONS

RISK MANAGEMENT ALERT

Be Alert for Policy Implications Related to COVID-19

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For those that subscribe to various sources that provide daily compendiums of insurance issues, a topic at the forefront relates to how the insurance industry is addressing the often lack of business interruption coverage for businesses affected by the coronavirus (COVID-19) pandemic. How that plays out will be determined over time, but for now the industry is showing clear signs of reacting to various COVID-19 exposures on a going-forward basis.

This exposure is obviously a significant one that carriers seem to have every desire to avoid. Recently, ISO developed their Communicable Disease Exclusion. This exclusion applies to Coverage A (Bodily Injury and Property Damage Liability) and Coverage B (Personal and Advertising Injury) and similarly states for both that:

This insurance does not apply to: Communicable Disease (BI/PD/Personal Advertising Liability) arising out of the actual or alleged transmission of a communicable disease. This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the: a. Supervising, hiring, employing, training or monitoring of others that may be infected with and spread a communicable disease; b. Testing for a communicable disease; c. Failure to prevent the spread of the disease; or d. Failure to report the disease to authorities.

Some key issues:

Whether carriers will include this endorsement (or one of their own) on upcoming renewals.

Depending on how this is viewed, admitted carriers will probably need to issue a conditional renewal notice advising the insured (and you as the agent) that the upcoming renewal will include some type of COVID-19 exclusion. If the coverage is with an E&S market, it is important to note that the standard conditional renewal notice requirement does not apply to them. They should note this on their renewal proposals. Special attention should be paid to identifying an exclusion pertaining to this issue. Securing a specimen form would be prudent to fully review the exclusionary language.

Communicate this information to your client. It might be best not to rely on only one approach to accomplish this. Contact your client as soon as you are made aware of the carrier's plans to include language of this type. If the conversation is verbal, follow up in writing to memorialize the conversation. It is possible that this exclusionary language may not be an issue of concern for every client. Document those conversations.

Include on your agency proposal a reference to the exclusion and ensure that the reference is noted in the discussion. Listing exclusions on proposals has been an approach used for many years and has been found to actually generate additional sales opportunities. When listing exclusions, it is best to state "Exclusions include, but are not limited to, the following".

Policy checking. Policy checking is a very under-appreciated E&O risk prevention technique. Many E&O claims could have been avoided by agents doing a more thorough job of policy checking. On the COVID-19 issue, agents should look for the inclusion of any specific exclusionary language. It may be a specific endorsement number and name, or it may involve the carrier refiling their liability coverage form to include this language. The change of edition dates should be a red flag that a substantive change was made. *It is important to also note any exclusionary language on any umbrella/excess liability coverage forms.*

A recent news article addressed U.S. businesses facing a potentially emerging legal threat related to COVID-19 from claims that workers brought coronavirus home and infected relatives, which one risk analysis firm said could cost employers billions of dollars. There have already been some lawsuits from this take-home exposure, which likely explains some of the language in the ISO exclusion. The article noted that between 7% and 9% of the roughly 200,000 U.S. COVID-19 deaths so far are believed to stem from take-home infections. The estimated potential for these lawsuits could be significant. Allegations that the business failed to adopt proper safety measures will be common.

On a side issue, yet still important, is how states are going to handle providing businesses (as well as healthcare workers, schools, etc.) with some form of immunity. This would prevent lawsuits arising from exposure, transmission or contraction of COVID-19 or any other virus mutation from essentially happening unless there is demonstrated reckless, intentional or willful misconduct on the part of the businesses or entities. A number of states have already passed this type of legislation with more likely to follow.

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