

OWNERS GUIDE TO COVID -19 INSURANCE CONSIDERATIONS

The rapid onset of the COVID-19 virus in the U.S. and subsequent guidelines around social distancing and stay-at-home has essentially halted travel leaving many hotels without the revenue streams to cover operating and fixed costs. Many hotels are expected to be temporarily closed, while those that remain open will operate at historically low occupancy levels. Hotel owners are likely wondering whether and to what extent existing property insurance policies will offset losses endured as a result of COVID-19. In addition, the presence of the highly contagious COVID-19 virus within our communities and potentially, within our hotels, may result in a liability related to employee or guest safety. Again, how will existing policies apply to real and hypothetical situations associated with this circumstance?

While it is impossible to imagine every potential scenario, Benchmark and the Owner Advisory Group have assembled the following insurance considerations to guide hotel owners in the areas of filing claims and limiting liability during these unprecedented and uncertain times. *Key takeaways offered below are based largely on informational sessions and materials presented by major insurance companies, Marsh and Lockton, as well as published online commentary from other insurance providers.*

Insurance Claims by Policy Type

PROPERTY INSURANCE

In addition to relief associated with the recently passed CARES Act, hotel owners will be evaluating in place property insurance policies as a potential means to recover ongoing financial losses associated with COVID-19. The key issue related to property insurance claims is the ability to prove physical loss or damage, which is almost unanimously a requirement for filing a claim. To date, some disagreement exists as to whether the presence of a virus, possible contamination, or the proximity to contaminated premises meet the threshold for physical loss or damage. The outcome as it relates to COVID-19 is yet to be determined.

In the current circumstance, owners should look for and review the following additional clauses or extensions associated with COVID-19.

- *Virus or Contamination Clause*
 - Roughly 50% of policies include a virus or contamination clause
 - Many “all risk” policies specifically exclude loss due to virus or bacteria; in these cases, owners are unlikely to get coverage for COVID-19 related losses
 - “All risk” policies without this exclusion are expected to receive coverage
 - Actual contamination of property (v. fear of contamination) may constitute property damage for insurance purposes
- *Communicable or Infectious Disease Extension*
 - Commonly used in the hospitality and health care industries
 - Requires actual (v. suspected) presence of communicable disease AND that access to the property is limited or prohibited by an authorized governmental agency
 - Three types of costs are recoverable under this extension: business interruption, clean up or removal costs, and costs incurred for reputation management

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➤ *Civil Authority Clause*

- Relates to the existence of an order of civil authority which prohibits access to the insured premises
- Claims under this clause may also require physical damage on premises, in proximity to premises, or dangerous conditions which led to the closure
- It is unclear whether current guidelines related to social distancing and stay-at-home will meet this threshold

WORKER'S COMPENSATION

Current circumstances are expected to result in heightened sensitivity to worker's compensation concerns. Furthermore, changes in workplace conditions and specifically, conversion from a local to a largely remote workforce may lead to an increased risk of exposure to COVID-19 as well as other safety concerns. *In most cases, exposure to or contraction of COVID-19 is not considered to be an allowable, work-related condition.*

The following are key conditions to be considered when evaluating a worker's compensation claim:

- Was there an increased risk or greater likelihood of contracting the condition due to the worker's occupation (typically applies to a health worker or first responder)?
- Would the worker have been exposed to the virus or condition outside of the workplace?
- Can the worker identify a specific source or event during employment that resulted in exposure to the virus?

For any claims associated with COVID-19, documentation of timing and location will be important. In addition, if a worker completes a quarantine period but does not test positive for the virus, coverage is not applicable.

In order to mitigate risk for worker's compensation claims related to COVID-19, best practices for owners/management companies include:

- Employers should instruct employees who are sick to seek medical care and if needed, should assist in coordinating care
- Employers should temporarily eliminate any red tape associated with taking time off for illness such as time-off requests and approvals, doctor's notes, etc.
- Employers should follow all local, state, and CDC guidelines

GENERAL LIABILITY

Insurers report that activity related to General Liability and associated with COVID-19 has been limited to date. However, this is an area that is expected to see increased activity over the long term. The most likely scenario for a potential liability claim may be alleged negligence associated with failing to protect a guest or vendor from being exposed to the virus on property.

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While there is some disagreement around whether bodily damage claims associated with COVID-19 will be covered by General Liability insurance, there is generally support suggesting that claims will be covered. However, there are certain exclusions as outlined below, which may result in limited or no coverage.

Owners should review General Liability policies for the following exclusions:

- *Expected or Intended Circumstances*: would or should the Insured have expected the exposure
- *Pollution*: policies typically have a broad definition of pollution and therefore, it is to be determined whether COVID-19 will be considered a pollutant
- *Bacteria*: this is another grey area, dependent on whether differences between bacteria and viruses are considered and/or recognized by the courts

What Owners should Expect

- Litigation associated with Property Insurance, Worker's Compensation, and General Liability; and
- Anticipated volume of claims associated with COVID-19 will delay or elongate processing of claims.

Best Practices for Owners

- Review coverage and policy language with an insurance broker or claims consultant and consider engaging legal counsel
- In partnership with management companies, gather documentation related to persons on premises during this period, relevant government communications, locations associated with contamination or potential contamination, and records of financial loss
- In partnership with management companies, outline and list potential risks to the hotel related to COVID-19 and begin conversing with insurers as soon as possible

Other Liability Considerations

In addition to the items noted above, there several factors unique to the COVID-19 circumstance which could result in potential liability for owners and operators. Insurers tend to be opportunistic in times of crisis and it is therefore essential for owners in partnership with management companies to consider the following:

- *Employment Practices Liability; Directors and Officers Liability*
 - Actions that companies, directors or officers take or fail to take could result in liability
 - Operational or financial disclosures; operational or financial preparation
 - Disclosures and guidance around the circumstance should be consistent with the execution of a plan
 - Fact-based and non-emotional communication around events

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➤ *Cyber, Privacy and Technology Concerns*

- Bad actors are taking advantage of the current circumstance – specifically, a largely remote workforce
- Increased phishing attempts with subjects like "remote work policies"
- Companies should ensure VPN is configured for security
- Employees should be provided direction to protect their personal devices, if these are being used to conduct work
- Companies should monitor logins regularly; the best practice is to eliminate access for laid off and furloughed employees, so company information cannot be stolen
- When relying on third parties for technology, etc. to support a remote workforce, check in with the provider frequently to ensure continuity of service or anticipate potential business interruption

➤ *Compliance Issues*

- For any mass layoffs and closings, employers must comply with WARN policies
- Alert health and dental insurance carriers of any anticipated changes to eligibility to ensure continuity of coverage for employees under furlough or other conditions
- Under furlough or other pay reductions, evaluate whether plans continue to be considered affordable under the Affordable Care Act (ACA)
- If employees are expected to lose eligibility, employer must offer COBRA
- Health Savings Accounts (HSA) will pay for COVID-19 testing and treatment before meeting a high deductible