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Business Interruption Insurance Coverage: Four States at the Forefront of Responding to COVID-19 Losses

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As discussed in our March 19, 2020 [alert](#), policyholders should consider the below insurance coverages that may be triggered by COVID-19 losses or claims:

- Business Interruption Coverage
- General Liability Coverage
- Workers Compensation Coverage
- Directors and Officers Coverage

Policyholders should keep in mind that each situation is unique, based on the policy language, factual circumstances and applicable state law. As a starting point, policyholders should examine their policy language carefully to determine whether coverage may exist for COVID-19 related losses or claims.

As businesses remain closed in response to state or local orders to prevent the spread of COVID-19, some states are actively looking for ways to support businesses facing considerable losses. To date, four states—New Jersey, Massachusetts, Ohio, and most recently, New York—have proposed legislation that would clarify and expand the scope of business interruption insurance coverage—found in commercial property policies—to ensure coverage for COVID-19 closures.

New Jersey [introduced a bill](#) on March 16, 2020 to provide businesses a mechanism for recovery of their COVID-19 losses from their insurers. If enacted, the bill would apply to businesses in New Jersey with less than 100 full-time employees who work 25 hours or more a week that already had business interruption coverage as of March 9, 2020, the date the Governor declared a public health emergency and state of emergency. The bill would require every policy insuring against loss or damage to property, including the loss of use and occupancy and business interruption, to include coverage for business interruption due to global virus transmission or pandemic as a covered peril. The coverage awarded to policyholders would be subject to the limits of the policy. Movement of the bill has stalled on the New Jersey Senate floor, but the sponsors are reportedly working with the insurance industry on a solution for small businesses. Whether the solution is legislative or based on industry action remains to be seen.

Most recently, on March 27, 2020, the **New York** State Assembly [introduced a bill](#) nearly identical to the New Jersey legislation. According to the justification statement from both bills, while the Insurance Services Office has developed a rider to provide coverage for viruses and pandemics, no state has approved the language to date, and such perils are typically excluded from policy coverage. Accordingly, the goal of these measures is to provide clear coverage to businesses that had the foresight to purchase business interruption coverage but suffered a loss for which coverage is not readily available from carriers.

During the week of March 23, 2020, the **Ohio** House of Representatives [introduced a bill](#) almost identical to the New Jersey bill, except that the bill would apply to businesses with 100 employees or less.

Representatives from the **Massachusetts** Senate and House of Representatives in General Court [introduced legislation](#) with broader terms than its New Jersey, Ohio, and New York counterparts on March 24, 2020. The Massachusetts bill would apply to businesses with 150 or less full-time employees with policies in force on the date the bill would become effective, or in force prior to the Governor of Massachusetts rescinding the emergency declaration announced on March 10, 2020. The bill would require every policy insuring against loss or damage to property, including the loss of use and occupancy and business interruption, to provide coverage for business interruption resulting directly or indirectly

from COVID-19, including all mutated forms of the virus. The bill specifies that this coverage would apply regardless of policy endorsements or exclusions. Additionally, the bill would prohibit insurers in Massachusetts from denying a claim for loss of use and occupancy and business interruption on account of COVID-19 being a virus, even if the policy excludes losses resulting from viruses, or for the reason that there is no physical damage to the policyholder's property.

While such bills would provide tremendous aid to small businesses, if enacted, the insurance industry is expected to challenge such legislation on constitutional freedom of contract and other grounds. The insurance industry is already resisting legislative attempts to clarify and expand the scope of property policy coverage. After epidemics such as SARS, MERS, Zika, and Ebola, insurance carriers wrote exclusions for infectious diseases into many policies.

On March 25, 2020, the National Association of Insurance Commissioners (NAIC) [issued a statement](#) cautioning against Congressional action that would require insurers to pay COVID-19 business interruption claims for which policies do not cover nor contemplate. In the statement, NAIC wrote that these policies were not designed or priced to provide for coverage against communicable diseases, and often exclude coverage for such risks.

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