



FOLEY
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COVID-19 Insurance Issues in the Higher Education Community

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1. Property / Business Interruption Coverage

- A. Key coverages and variations in policy language
- B. Insurer defenses / Obstacles to coverage
- C. Proposed federal and state legislation mandating coverage

2. Liability Coverages

- A. Bodily Injury (Infection) of Students, Faculty and Others
- B. Employment Practices
- C. Housing Reimbursement Claims
- D. “Failure to Educate” Claims

3. Practical Advice

- A. Notice ASAP
- B. Importance of Tracking Expenses for Proof of Loss

Typical Property Insurance “Business Income” Coverage

“We will pay for the actual loss of Business Income you sustain due to the necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration.’ The ‘suspension’ must be caused by **direct physical loss of or damage to property** at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.”

Key Terms:

- “Time Element” loss
- “Gross Earnings” or “Business Income”
- “Direct physical loss of or damage to property”
- “Period of Restoration” or “Period of Liability”
- “Covered Cause of Loss”

“We will pay for the reasonable and necessary Extra Expenses incurred by the Insured, during the Period of Liability, to resume and continue as nearly as practicable the Insured’s normal business activities that otherwise would be necessarily suspended, due to **direct physical loss of or damage** caused by a Covered Cause of Loss . . .”

Key Terms:

- **“Extra Expense”**: “that amount spent to continue the Insured’s business activities over and above the expenses the Insured would have normally incurred had there been no direct physical loss of or damage caused by a Covered Cause of Loss.”

Coverage extends to loss of Business Income resulting “from the necessary Suspension of the Insured’s business activities . . . caused by action of civil authority that prohibits access to the described premises. The civil authority action must be due to **direct physical loss of or damage to property** at locations, other than the described premises, caused by or resulting from a Covered Cause of Loss.”

- Significant variations in wording. **Read your policy!**
 - Typically requires *actual prohibition* and *direct physical loss*.
 - May require that physical loss occur within specified distance of insured’s premises.
 - May include Extra Expense coverage.
- Usually “sublimited” and often limited to 30 or 60 days.
- Bear in mind “due to” wording. Insurers likely will contend that any physical loss to property is at best incidental.

Special Coverage Types: Contingent Business Interruption

Coverage extends to loss of Business Income sustained resulting from “the necessary ‘suspension’ of the insured’s business activities at the described premises if the ‘suspension’ results from **direct physical loss or damage** caused by a Covered Cause of Loss to property at Dependent Locations or Attraction Properties.”

- Supply chain interruption or customer impacted; loss of foot traffic because of closure of nearby attractant business (like an anchor tenant at a shopping mall).
- May extend to Extra Expenses incurred, but not always.
- **Direct physical loss** issue again arises under most policies, albeit at the premises of the supplier, customer or attractant business.
- Usually “sublimited.”

Coverage extends to loss of Business Income sustained resulting from “the necessary Suspension of the Insured’s business activities at an Insured Location if access to that Location by the Insured’s suppliers, customers or employees is physically obstructed due to the owner [or] landlord . . . prohibiting access to the Insured location.”

- Applies to situations where the University is the tenant.
- Check your policy: Typically no **direct physical loss** requirement here.
- Typically requires actual prohibition of access.
- Usually “sublimited.”

- “Direct physical loss or damage” requirement
- Causation issues
- Prohibition of Access
- Virus / Fungus / Pollution exclusions

- Coverage not limited to physical damage; also encompasses physical “loss.” What is “physical loss”?
 - Some courts have held that physical alteration of structure is not required.
 - Examples of covered “physical loss”: released ammonia gas, smoke from wildfires, asbestos-containing building materials.

- No precedent yet addresses presence of virus spores, but rationale fits. No less physically present than vapors, smoke or asbestos fibers.
 - Likely that the law will vary from state to state.
 - If presence of virus is required for coverage, it may be difficult for policyholders to meet burden of proof.

- Even if you can prove presence of virus, is that the cause of loss?

- Business Income and Extra Expense loss covered only if the suspension or impairment of operations is “**caused by**” or “**due to**” direct physical loss or damage.
- For some policyholders, the ongoing suspension and impairment of operations arguably is not caused by the presence of the virus, but rather, by shelter-in-place and similar orders focusing on social distancing.
- Also, loss is covered only during the “**period of restoration.**”
 - Are losses covered only until your property is cleaned and the virus is removed?
 - Or does the policy cover losses until your impaired operations are restored to normal?
 - **Check your policy!**
- Extended “period of restoration” or “Extended Business Income” extension?

■ Virus / Contamination exclusions – again, wordings differ.

- Basic: excludes coverage for loss from “Presence, growth, proliferation, spread or any activity of “fungus”, wet or dry rot or bacteria.”
- Notably virus not mentioned.
- Expanded version in some policies: “We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease” (ISO 2006)
- Arguably suggests that presence of virus can constitute “physical loss.”

■ Expect challenge to ISO 2006 enforcement based on representations to insurance regulators.

■ Fungus / Pollution exclusions

■ Acts or Decisions exclusion

- “But business interruption insurance, that’s getting a lot of money to a lot of people. . . . [A]nd they’ve been paying a lot of money for a lot of years for the privilege of having it. And then when they finally need it, the insurance company says, ‘we’re not going to give it.’ **We can’t let that happen.**”
 - President Donald Trump, April 10, 2020
- State legislation has been proposed in at least MA, NJ, NY, LA, OH, PA, RI, and SC.
- Issues for Universities: Retroactivity and employer size
- Federal legislation also proposed that would apply to all policyholders (not just small businesses) and preempt contrary state law.

“Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, **notwithstanding the terms of such policy** (including any endorsement thereto or exclusions to coverage included therewith) which includes, as of the effective date of this act, the loss of use and occupancy and business interruption in force in the commonwealth, shall be construed to include among the covered perils under such policy coverage for business interruption directly or indirectly resulting from the global pandemic known as COVID-19, including all mutated forms of the COVID-19 virus. Moreover, **no insurer in the commonwealth may deny a claim** for the loss of use and occupancy and business interruption on account of (i) COVID-19 being a virus (**even if the relevant insurance policy excludes losses resulting from viruses**); or (ii) there being **no physical damage to the property** of the insured or to any other relevant property.”

■ **H.R. 6494: Business Interruption Insurance Coverage Act of 2020**

- Introduced April 14, 2020 by Rep. Mike Thompson (D-CA)
- Similar to state legislation, but applies to all policyholders
- No provision for repaying insurers for losses they are forced to pay

■ **H.R. 6497: Never Again Small Businesses Protection Act of 2020**

- Introduced April 14, 2020 by Rep. Brian Fitzpatrick (R-PA)
- Covers losses resulting from governmental orders requiring cessation of operation during “national emergencies”

■ **H.R. 7011: Pandemic Risk Insurance Act of 2020**

- Introduced May 26, 2020 by Rep. Carolyn Maloney (D-NY)
- Similar to TRIA (Terrorism Risk Insurance Act), except voluntary
- Provides financial backstop (of up to \$750 billion)
- Would not apply retroactively to existing business interruption insurance policies.

- A. Bodily Injury (Infection) of Students, Faculty and Others**
- B. Employment Practices**
- C. Housing Reimbursement Claims**
- D. “Failure to Educate” Claims**

Likely covered in General Liability Policy.

Key Terms:

- “Occurrence” typically defined as: “an accident during the Policy Period or the continuous, intermittent or repeated exposure to condition that commence during the Policy Period that cause Bodily Injury or Property Damage neither expected nor intended by the Insured.”
- “Bodily Injury” typically defined to include “sickness” or “disease.”
- **Check your policy language:**
 - Check whether the “pollutant” exclusion includes viruses.
 - All claims may be considered a single “Occurrence.”

Likely covered in Educators Legal Liability Policy.

Key Terms:

- Anticipating claims based on failure to promote or award tenure
- “Wrongful Act” typically includes “failure to hire or promote, denial or removal of tenure; constructive discharge”
- Breach of Contract Exclusion does not include individual employment contracts.
- Keep an eye out for collective bargaining agreements.

Unlikely to be covered in liability policies.

Key Terms:

- General Liability and Educators Legal Liability policies contain Contract Exclusions
 - Example: “Breach of contract is not an Occurrence.”
 - Exception for “contracts with a student for educational services” does not apply

Likely covered, at least in part, by an Educators Legal Liability Policy.

- “Wrongful Acts” include “failure to educate.”
- Covers Loss exceeding Self-Insured Retention amount.
- For breach of contract claims:
 - Exception to Contract Exclusion applies, stating that exclusion “shall not apply to Defense Costs and Damages for the breach of . . . A contract with a student for educational services.”
- For unjust enrichment claims:
 - Check the Unjust Enrichment Exclusion in your policy – may be limited to exclude coverage for an unjust enrichment award and only on final adjudication.

■ Limitations in the definition of “Damages”

- The “Value of tuition or scholarships”

■ Claims seeking the return of student fees

- These breach of contract claims may not fall entirely within the Contract Exclusion’s exception.
- “Educational services” is not defined.
- Coverage for claims for return of fees may depend on what fees are used for.

■ Policies may contain an exclusion for “any demand for the return of funds or gifts brought by or on behalf of a government agency or other entity or person, or any actual or alleged violation of the False Claims Act or similar laws.”

■ Allocation arguments

■ Notice – “as soon as practicable” after the loss

- For most policyholders, losses probably began as early as March 2020; give notice now to avoid late notice defense
- FIFO rule for paying claims if legislation passes?

■ Mitigation of Loss

- Required to make reasonable efforts to mitigate
- Mitigation costs covered by policy

■ Cooperation and Assistance

- Be reasonably attentive to insurer requests for information

■ Proof of Loss

- Check policy requirements on timing and substance.
- 90 days after physical loss or damage? Only upon insurer request?
- Start collecting data and documentary support for proof of loss now!

Claim Denials and Next Steps

- Absent broad-based legislation mandating coverage or establishing a TRIA-like government reinsurance program, many or most claims will be denied.
- Critical – but not always easy - to distinguish reservation of rights from denial.
- If no immediate outright denial, “proof of loss” submission may be required.
- Statutes of limitations clock typically will start on “date of loss.” Many policies just one year. Those governed by Mass. law required to be no less than two years. Be very conservative; assume earliest conceivable date; first impacts.
- Consult with insurance advisor or counsel well in advance of expiration to evaluate coverage and claim. “Reference” procedure first step, but proceed with caution.



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