



An Insurance Checklist for the Hospitality and Commercial Real Estate Industries in Response to the COVID-19 Pandemic

By Jeffrey J. Vita , Michael V. Pepe,
Melanie McDonald & Ashley McWilliams

No person or industry in the world will go unaffected by the COVID-19 pandemic. Two related industries that are being hit the hardest are the hospitality and the commercial real estate industries. The hospitality industry is comprised of four segments: food and beverage (F&B), travel and tourism, lodging, and recreation. These four segments often overlap with each other and most segments overlap, to some extent, with the commercial real estate industry.

As hospitality businesses shut down or drastically scale back their operations – either voluntarily or due to governmental edict in efforts to flatten the curve of the pandemic – the commercial real estate industry is similarly impacted. Commercial landlords collect rent from all four segments of the hospitality industry. As the tentacles of the pandemic reach further into all businesses, tenants will undoubtedly seek rent abatement or other relief under their leases.

Commercial realtors in non-hospitality industries, such as nursing homes, senior housing, college housing, apartments, malls, other shopping centers, and fitness centers are also experiencing follow-on effects of the pandemic.

Among the many questions businesses have, as the scope of the losses becomes clear, is whether the insurance they purchased will protect them. The first, and overarching concern by most businesses is whether they have insurance coverage for the economic loss of income from closure or reduction in operations. Secondly, companies in these industries face potential claims by third parties, such as from employees, customers, tenants and shareholders. Below, we provide a checklist of policies that may provide coverage for these anticipated claims. Your policy may have terms that expand or restrict coverage, including specific exclusions for losses relating to a virus, epidemic, or other communicable disease. Please read your policy carefully to determine what coverages it may provide under these circumstances.

FIRST-PARTY EXPOSURES

Possible Claim

Lost rents

- Rent abatement: Government ordered moratorium on rent payments
- Force majeure (“Acts of God”) clauses in commercial leases as means to excuse rents
- Forced closure due to government mandate

Where to Look for Coverage:

- Business Interruption Coverage under Commercial Property Policy, if it can be tied to physical damage or loss.
- Special Perils
- Civil Authority
- Ingress/Egress

Service disruption, labor and/or material shortages

- Moratorium on business openings due to government mandated closures or voluntary closures
- Business operations not functional because limited number of available workers
- Cannot operate business due to material shortages
- Delay in product deliveries

Where to Look for Coverage:

- Business Interruption Coverage under Commercial Property Policy, if it can be tied to physical damage or loss.
- Special Perils
- Civil Authority
- Ingress/Egress

Event cancellation

- Shelter in place orders and social distancing requirements cause events to be cancelled

Where to look for Coverage:

- Business Interruption coverage within commercial property policy
- Stand-alone Event Cancellation Policy

Clean up costs

- Preventative measures and mitigation to reduce risk of exposure
- Decontamination/disinfection at businesses exposed or in “hot-zones”

Where to look for Coverage:

- Commercial Property Policy
- Environmental/Pollution Policy

Crisis management

- Establish/implement health and safety protocols
- Company- imposed business travel restrictions
- Employment-related inquiry by government, civil rights or public interest group
- Death or severe illness of key company executive
- Other adverse publicity against company related to COVID-19

Where to look for Coverage:

- Commercial Umbrella Policy
- Technology errors & omissions policy
- Internet/online Property and Liability Policy
- Employment Practices Liability Policy
- D&O/Management Liability Policy
- Stand-alone Crisis Management Policy

THIRD-PARTY EXPOSURES

Possible Claim**Bodily/Personal Injury claims**

- Alleged failure to protect customers from the virus – for example, failing to shut down a gym, pool/spa, or restaurant after learning an employee or recent customer has tested positive for COVID-19
- Alleged improper cleaning of facilities, resulting in exposure
- Alleged failure to protect other tenants, notify if aware other tenant in building is sick or was exposed
- Invasion of privacy – disclosure of the identity of a sick patron or tenant

Where to look for Coverage:

- Commercial General Liability Policy (CGL)

Employment-related claims

- Failure to protect employees (not restricting travel or requiring them to come to work), resulting in exposure and sickness
- Alleged failure to exercise reasonable care in guarding against, warning of, or reasonably discovering the risk of exposure to COVID-19 at company events, offices, or jobsites
- Alleged failure to protect an employee results in employee's family member getting sick
- Claim due to extended unpaid leave or termination of infected employees requiring quarantine and treatment

- Claim due to extended unpaid leave or termination of employees due to project/ jobsite shut-down
- Claim arising out of reduction in workforce due to loss of business
- Claim alleging discrimination or harassment based on alleged disability (being infected) or based on national origin/race
- Claim alleging violation of ADA or similar state statute
- Allegations of mismanagement of 401k assets due to investment choices and current market turbulence
- Allegations that the company's benefits plan did not provide adequate testing or treatment of COVID-19
- Alleged violation of HIPAA privacy provisions

Where to look for Coverage:

- Workers' Compensation & Employer's Liability Policy
- Employment Practices Liability (EPLI) stand-alone Policy
- EPLI Endorsement to CGL or Businessowners Policy (BOP)
- CGL for any non-employee third parties
- Fiduciary Liability Policy
- Employee benefits coverage on CGL policy

Shareholder claims

- Alleged failure to develop adequate contingency plans
- Alleged failure to observe government-mandated or recommended protocols
- Alleging failure to properly disclose the risks COVID-19 posed to the company's business and financial performance
- Claims alleging other unreasonable action (or inaction) in response to the COVID-19 pandemic which caused the company economic losses
- Failure to have contingency plan for key executives and/or to purchase key man life insurance

Where to look for Coverage:

- Directors & Officers Liability (D&O) Policy – either stand-alone or in a package policy

For more information, please contact Jeffrey J. Vita at jjv@sdlaw.com or Michael V. Pepe at mvp@sdlaw.com, Melanie A. McDonald at mam@sdlaw.com or Ashley McWilliams at amw@sdlaw.com.