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Insurance Coverage for Swine Flu Claims

By Diana Shafter Gliedman, Marshall Gilinsky and Rhonda D. Orin

As the world braces for a Swine Flu pandemic, the first concern of every business is the safety of their workers — and customers, if they're in the hospitality industry or another business that draws people into physical proximity to one another.

Step One is to access and implement the Business Pandemic Influenza Planning Checklist jointly produced by the CDC and Department of Health and Human Services, posted at http://www.pandemicflu.gov.

Step Two is to consider the "health and welfare" of the business itself – and the various protections provided by the business' insurance policies. To use a health metaphor, such policies are the business equivalent of a vaccine against the flu.

Insurance may provide relief in a number of ways. Property insurance policies, for example, may become relevant if a flu pandemic disrupts the daily operations of a business. A business may be able to file a business interruption claim in various circumstances, such as if its office buildings or warehouses are shut down or access is otherwise impaired for reasons related to the pandemic.

Liability insurance policies would come into play for any business with exposure to claims by individuals. For many businesses, that liability, if any, would be limited mainly to workers' compensation claims. Depending on the facts, it is conceivable for employees who become ill to claim that they were exposed to the disease in the course of their employment.

For other businesses, though, the risks are higher. For example, businesses subject to "invitee liability" — e.g., restaurants and hotels, cruise operators, conference organizers, and others that draw people together —may face claims from anyone who becomes ill shortly after visits to their premises. These businesses should be alert to this risk, and be prepared to give notice to their liability insurance companies as soon as they become aware of actual, or even potential, claims.

The same is true for businesses that could conceivably be held accountable for exposing people to the disease through their products or services. Although this category seems small, potential candidates are businesses that provide transportation services, such as airlines, as well as businesses in the food service industry, such as caterers and supermarkets.

Similarly, should shareholders in companies adversely affected by the flu outbreak make claims against executives based on allegation of wrongful acts by management that caused harm to the claimants, then

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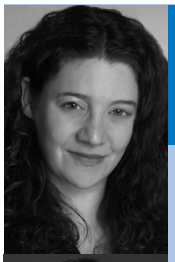

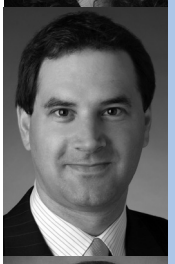

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directors and officers (D&O) insurance should provide coverage for such claims.

As a practical matter, the risk of such claims may be small. It may be unlikely, if not impossible, for people who become ill to prove the exact moment and location of the exposure that was the cause. For planning purposes, though, that practical consideration is not the point. It makes good sense for every business to take stock now, before the pandemic spreads, of the ways in which it might affect their operations and the types of insurance that may protect them.

Below, we consider key issues likely to arise from claims under these types of insurance policies.

1. Is Business Interruption Coverage Available for a Swine Flu Pandemic?

Depending on the facts, it may be possible for a swine flu pandemic to give rise to business interruption coverage. Such coverage typically is purchased by businesses as part of their property insurance policies, in the form of a rider or endorsement or an optional additional coverage. Business interruption coverage is designed to protect businesses from losses that they may suffer unexpectedly due to unavoidable interruptions in their daily operations.

Business interruption coverage may apply in a variety of circumstances, such as a forced shut-down, or a substantial impairment in access to, a business' physical plant or warehouses. Recent, infamous examples of events giving rise to such business interruptions are the events of September 11, 2001, and Hurricane Katrina in Florida.

In most property policies, business interruption coverage is only triggered when the site suffers property damage. Physical damage, however, can include contamination of equipment. Moreover, some policies, particularly those written for policyholders in the hospitality industry, do provide coverage for losses stemming from infectious disease without requiring physical damage to premises. Further, civil authority coverage, which is triggered when authorities shut off access to an area in which a business is located, can be triggered without physical damage to the policyholder's premises.

The unfortunate events of 9/11 and Hurricane Katrina illustrated clearly that, for a business to be fully protected, it is essential for its risk manager, or other person responsible for its insurance, to maintain a complete set of all insurance policies in a secure location

outside of the business premises. Otherwise, if a business is unexpectedly deprived of access to its premises, it will find itself deprived as well of access to the very policies that it needs to file a business interruption claim.

At this point, any business that has not already secured a set of its insurance policies, and key non-insurance documents as well, in a secure, off-site location should do so immediately. It may be a small inconvenience to make these arrangements, but that inconvenience is more than offset by the benefits that the business would garner on the day that it needs those off-site copies.

2. Is there CGL or D&O Coverage for Claims Related to Swine Flu?

Commercial general liability, or "CGL," coverage is designed to cover policyholders against claims brought against them by others, alleging that the policyholder's conduct caused bodily injury to the claimant such as sickness and disease resulting from exposure to harmful conditions. Since most claims by sickened non-employees would fit this description, CGL coverage will be a key source of protection against such claims.

Any policyholder that receives even one such claim faces the risk — due to the way in which this disease is contracted and spread — of being the target of many more claims. Thus, it is important that notice is given as soon as possible to the CGL insurance company. Early notice will ensure that the CGL insurance company is not able to try to deny coverage based on the contention that it could have helped stem the policyholder's exposure to additional claims if only it was given notice sooner, and therefore, was prejudiced by some supposed delay in notice.

It is possible that individuals other than those personally sickened by the flu outbreak (e.g., shareholders in companies adversely affected by the flu outbreak) may make claims against companies or their executives based on allegations that management's acts or omissions caused such claimants to suffer financial losses. Although most D&O polices contain exclusions for claims alleging bodily injury, such claims for financial damages are covered under D&O insurance. As with CGL coverage, it is important for policyholders that become aware of such claims against them to give notice to their insurance company as soon as possible, and certainly before the policy period or reporting period for their current D&O coverage expires.

3. Will Afflicted Workers Be Covered Under State Workers' Compensation Laws?

Assuming one or more of a company's workers become ill, will those afflicted workers be entitled to workers' compensation benefits? That depends on how the workers became ill and the nature of the illness. Virtually every state workers' compensation statute provides that an employee will be entitled to benefits for what is known as an "occupational disease." To constitute an "occupational disease," two conditions must be met: (1) the disease must be proven to be due to causes and conditions that are characteristic of and peculiar to a particular trade, occupation or employment; and (2) the disease cannot be an ordinary disease of life, to which the general public is equally exposed outside of employment.

The distinction between an occupational and an infectious disease, however, is not always easy to make. While occupational diseases are covered and ordinary diseases generally are not, the latter may in some circumstances be covered if a direct causal connection to the workplace can be established.

4. Does a Flu Outbreak Constitute An "Occupational Disease"?

If a business faces one or more workers' compensation claims arising out of an alleged illness, the business will have to determine whether or not to challenge that claim. Whether or not a given illness would constitute an "occupational disease," and thus be covered under state workers' compensation law, is an issue of fact. There is limited case law dealing with the spread of contagions in the workplace to provide insight into the factors a court would examine to determine whether a given outbreak would be sufficiently connected to the workplace to constitute an "occupational disease."

In California, a breakout of kerato conjunctivitis — a contagious eye disorder — among employees at a steel company was found to be "proximately caused by and to have arisen out of the employment" and "constituted a special

exposure in excess of that of the commonality." In a case called Bethlehem Steel Co. v. Industrial Accident Comm., the California Supreme Court held in 1943 that conjunctivitis was apparently "epidemic" in the shipyards of the defendant and that, "although there were many cases of the disease among the public, there [was] nothing in the record to show that the same proportion as in the shipyards was affected."

Washington, too, requires a direct link between the occupational injury or disease and the employee's scope of employment. In affirming an award of workers' compensation to an employee who contracted asthma from exposure to dust, smoke and fumes at his workplace, the court found a correlative link between the affliction and the nature of the employment. In Simpson Logging Co. v. Department of Labor and Industries, the court held:

> Under the present act no disease can be held not to be an occupational disease as a matter of law where it has been proved that the conditions of the extra-hazardous employment in which the claimant was employed naturally and proximately produced the disease and that but for the exposure to such conditions the disease would not have been contracted.

It is clear that an employee seeking workers' compensation coverage for illness would need to demonstrate either that there was a proximate link between the disease and the employee's employment or that he or she was subjected to some special exposure in excess of that of the commonality.

5. How Many Self- Insured Retentions Will Apply In The Event Of Outbreak?

If workers are able to demonstrate that they have contracted an illness through their employment and are therefore entitled to workers' compensation benefits, one question that is likely to arise is the number of self-insured retentions that will apply for a given outbreak.

Many workers' compensation insurance policies, particularly policies providing excess coverage, provide insurance coverage beyond an initial self-insured retention (essentially, a deductible) for each accident and/or each employee for disease, after which unlimited coverage is provided for workers' compensation coverage up until the applicable statutory caps. Thus, if an illness is deemed to constitute a "disease," most policies would apply a separate retention for each individual employee asserting a "disease claim." This is the likely outcome if workers contract a disease such as the swine flu—pandemic outbreaks typically constitute "diseases" and not "accidents" for purposes of determining the number of applicable retentions under workers' compensation policies. Employers facing multiple claims could thus face extremely high exposure.

If, however, an illness outbreak is triggered by a causal event at the workplace and directly flows from the work being performed, it may be argued that the resulting disease has been produced by an accident, thus reducing the number of applicable self-insured retentions. One commentator noted the following:

> [I]f the cause of an infectious disease is traceable to a specific incident(s) at or related to work, then contracting the disease meets the definition of accident and qualifies as a covered injury. For example, if contracting typhoid fever could be traced to polluted water in a factory, then the illness is a covered injury.

Whether a given outbreak infecting multiple workers would be regarded as an "accidental event" or an "occupational disease" depends on the specific circumstances leading to the initial exposure to the disease. If a specific event led to the spread of the contagion, an outbreak could be considered an "accident" causing bodily injury as opposed to a disease. Thus, a business would only be required to pay one self-insured retention, no matter how many employees were actually exposed to contagion or contaminant.