

# COVID-19 Insurance Issues

May 2020



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## Introduction

As we continue to navigate the environment surrounding COVID-19, Willis Towers Watson (“WTW”) has released several white papers commenting on Property & Casualty insurance coverage as it relates to the virus under several product lines. Separately our team is working with our clients to address critical Health & Benefit decisions related to COVID-19 and the impact the virus may have on their employees and benefit planning. The below commentary combines various white paper concepts to provide a summary of various issues our team is actively managing.

Further note that as discussions progress within the Property & Casualty industry, WTW’s claims departments and coverage experts are continuing to monitor state legislature actions as well as articles and published information that could pertain to insurance coverage for COVID-19, with any and all relevant findings to be shared as the situation continues to evolve.

**Caveat:** Please be advised that this commentary is not a legal opinion. It is simply based on our experience and to provide a summary of the items we are monitoring and addressing. All coverage decisions will be issued by the insurance company involved, based on the applicable law as applied to the facts and the language of the specific policy in question.

## Property & Business Interruption

Property and business interruption policies typically contain two key requirements in order to trigger coverage:

1. Physical loss or damage to insured property.
2. The physical loss or damage must be the result of or be caused by a “Covered Cause of Loss.”  
Under most property policies, this means that the cause of loss has not been excluded in the policy.

For policyholders that can demonstrate that the virus was actually present at one of their insured locations, disease contamination could constitute physical loss or damage. This could open the door to potential coverage under the Contamination Clean-up, Decontamination Cost or similar coverage extensions included in most property policies – as long as the policy doesn’t exclude disease/virus contamination or pandemic as a “Covered Cause of Loss” (requirement 2 above).

Any business interruption coverage included in a property policy requires the same hurdles be met before coverage applies. Physical loss or damage by a “Covered Cause of Loss” is necessary. The business interruption coverage in a property policy is directly tied to the physical damage coverage. A general downturn in business in the absence of physical loss or damage by a “Covered Cause of Loss” is typically not covered. However, loss of business income or extra expenses incurred while one decontaminates a location that had actual COVID 19 present may be covered – as long as the policy doesn’t exclude disease/virus contamination or pandemic as a “Covered Cause of Loss”.

We have received numerous coverage inquiries about income loss due to closure because of civil authority. These civil authority notices typically point to protection of the health, safety and welfare of the public as the reason for the closure, so they fail to meet the policy requirement for physical loss or damage from a “Covered Cause of Loss.” Therefore, typically business income claims due to local and state governments shutting businesses down are not covered with or without a virus/disease exclusion.

Some policies, although rare, do extend cover via Communicable Disease endorsements. If it does exist, it is typically in hospitality-retail - healthcare manuscript policies and is sub-limited at very low limits; for years carriers have drafted policies to minimize or eliminate the extent to which property policies could get pulled into paying communicable disease claims.

Stand-alone coverage for pandemic business interruption losses is available on a limited basis to a few select industries (i.e. hospitality, leisure and mining) and at a significant premium rate. We are working to have broader market options available in the coming months but anticipate the pricing may continue to be a deterrent to wide-spread purchase of this coverage.

## Evaluating potential property or business interruption claims and noticing carriers

In recent weeks, there has been a number of articles which discuss several states introducing legislation to retroactively remove virus exclusions from property policies. Below is a link to one such article:

<https://www.whiteandwilliams.com/resources-alerts-NJ-Legislature-May-Force-Insurers-To-Pay-COVID-19-Claims-Despite-Exclusion.html>

While it is our view that any move to retroactively change insurance contracts would be found unconstitutional and many insurers and other industry organizations are making this and other related arguments to the various legislatures, it will likely be years before we know the final determination.

Therefore, for policyholders that have measurable losses resulting directly from the impact of COVID 19 (i.e clean-up costs, lost income and/or extra expenses incurred), we are recommending they consider placing their property insurers on notice to preserve obligations around notice of claim requirements.

The decision to notice insurer(s) should be weighed carefully as any notice will likely yield an extensive information request as there will be an obligation to substantiate the claim and value the loss.

To move forward with noticing insurers on your behalf, carriers will require the following information:

**INSURED:** XXXXXXXXXX

**POLICY TERM:** XXXXXXXXXXXXXXX

**POLICY NUMBER:** XXXXXXXXXXXXXXXXXXXX

**LOCATION OF LOSS:** XXXXXXXXXX

**DATE OF LOSS\*:** XXXXXX

\*We would suggest using the first date that the virus was present at a location if that applies. Otherwise, the first date that your business was impacted by civil authority actions closing or restricting business.

**DESCRIPTION OF LOSS:**

*Version 1:* Loss of Revenue resulting from closure of business due to coronavirus and government mandates

*Version 2:* Adverse consequences related to the coronavirus at the location with a confirmed presence of the virus.

**CONTACT:** XXXXXXXX

ADDITIONAL LOCATIONS MAY BE ADDED TO THE CLAIM AS THE SITUATION DEVELOPS

# Workers' Compensation

The following information is intended to give guidance in the area of workers' compensation (WC) claims as it relates to COVID-19:

## Three recommendations

1. **If your employee reports an injury or illness to you as work related, report it immediately to your workers' compensation carrier or third-party claim administrator.** Follow your standard workers compensation reporting protocols and file the claim immediately. Allow the claim staff to conduct a thorough investigation to determine whether benefits are due based on the facts and applicable state statute.
2. Consider reporting the matter to other potential sources of medical care and benefits that may be due the employee if their workers compensation benefits are denied. This step expedites the process in case of denial (i.e. treating this as nonoccupational until a formal decision on the WC claim is determined)
3. Employees may allege mental anguish, psychology issues or post-traumatic stress disorder associated with contracting COVID-19 or exposure to it. Consider reinforcing to employees the availability of your Employee Assistance Program (EAP) if available and where appropriate.

Workers' Compensation claims in the US are governed by state law. Under many state statutes, Covid-19 claims are likely to be classified as "occupational disease" claims v. "accident" claims. Triggers for coverage under state Occupational Disease statutes, which extend workers' compensation benefits to employees who allege a direct workplace connection to their disease, range from fairly expansive (providing coverage when the origin of the risk is simply connected with employment) to narrower rules (specific exclusions for diseases common to the general population). Until potential Covid-19 claims begin to surface and are reported to carriers, it is difficult to predict how statutes will be interpreted. Unforeseen events, like new laws enacted to shift costs associated with widespread Covid-19 illnesses, could occur. As "community spread" has now occurred, claimants likely will have difficulty establishing the origin of their disease and the required direct causal connection to the workplace.

Generally, the probability of a workplace outbreak of a communicable disease such as Covid-19 being covered by workers' compensation increases if several factors are present.

- (1) An elevated risk of contracting the disease associated with the type of employment (risk inherent in the occupation). Based on a March 9, 2020 communication from OSHA (see below). Each state will make this association based on their respective statutes.
- (2) How easily identifiable the transmission and the transmitter of the disease may be in relation to a specific point in time. Note that diseases transmitted by fellow employees are less likely to be covered than those transmitted by third parties.

- (3) How identifiable the disease's symptoms are with a specific medical condition ("prevailing factor"). The Corona virus has a unique genetic marker, so proving the relationship between the injury and the disease is not perceived as an obstacle.
- (4) The broadness of state statutes and case precedent.

We cannot be sure at this time how each state will determine the correlation between occupation and exposure risk. As temporary guidance, under an OSHA communication released March 9, 2020, workers fall into one of the following four risk categories, with the majority of all workers being in the "medium" or "lower risk" groups:

- **Very high exposure risk:** high potential for exposure to known or suspected sources of COVID-19 during specific medical, post-mortem, or lab procedures (e.g. doctors, nurses, and lab personnel)
- **High exposure risk:** High potential for exposure to known or suspected sources of COVID-19 (e.g. healthcare delivery and support staff such as those who must enter patients' rooms, and medical transport workers)
- **Medium exposure risk:** require frequent and/or close contact with (i.e., within 6 feet of) people who may be infected with COVID-19 but who are not known or suspected COVID-19 patients (e.g., those with frequent contact with international travelers)
- **Lower exposure risk (caution):** Those who do not require contact with people known to be, or suspected of being, infected with COVID-19 "nor frequent close contact with (i.e. within six feet of) the general public

Workers' compensation is no fault insurance. In certain circumstances, the injured employee may file an Employers Liability or "Part B" claim alleging potential negligence on the part of the employer. Generally, the claimant must prove:

- (1) Employer has a legal duty to protect employee from undue harm or injury;
- (2) Employer's actions or omission breached that duty;
- (3) Employee was injured as a direct result of the breach of duty; and
- (4) Employee sustained damages resulting from the injury.

If you receive a complaint from an employee:

The workers' compensation state statutes have a dispute resolution process built into the system. Each state is different in terms of the process. Refer employee to the state office that is responsible for adjudicating disputes.

It is foreseeable that as COVID-19 exposure increases and the number of impacted employees rises, plaintiff's attorneys will be aggressive. It is foreseeable that new legal theories will be tested to push recovery envelopes.

## The critical take-away

**If an employee says it is work related, report it and allow the carrier or third-party administrator to investigate and decide on compensability.**

### Disclaimer

*Each applicable policy of insurance must be reviewed to determine the extent, if any, of coverage for COVID-19. Whether workers compensation benefits are paid may vary depending on the jurisdiction and circumstances. For global client programs it is critical to consider all local operations and how policies may or may not include COVID-19 coverage. The information contained herein is not intended to constitute legal or other professional advice and should not be relied upon in lieu of consultation with your own legal and/or other professional advisors. Some of the information in this publication may be compiled by third party sources we consider to be reliable, however we do not guarantee and are not responsible for the accuracy of such information. We assume no duty in contract, tort, or otherwise in connection with this publication and expressly disclaim, to the fullest extent permitted by law, any liability in connection with this publication. Willis Towers Watson offers insurance-related services through its appropriately licensed entities in each jurisdiction in which it operates.*

## General Liability & Umbrella Liability

General Liability (“GL”) insurance is referred to as “third party” coverage. A GL policy provides coverage for the risk that other third parties – i.e., not your employees -- bring suit or file a claim against the policyholder seeking damages for which they allege the policyholder is legally liable. The GL policy will pay covered damages up to its stated limit of liability. If suit is filed, and what’s alleged is within the scope of coverage (not excluded), many GL policies will also pay reasonable and necessary defense costs, often in addition to the stated policy limits. The GL typically pays for your defense until the policy limit exhausts through the payment of damages. The existence and details of the duty to defend can vary greatly from policy to policy. Deductible or self-insured retention provisions will affect how and when the policy “attaches” to a loss.

As a practical matter, we anticipate it will be exceedingly difficult for most claimants to establish a given entity is specifically liable for infecting them with the virus. A vast array of community exposures could be the cause of any virus a claimant has contracted. However, the scope of your potential exposure will depend on the creativity and entrepreneurial activity of the plaintiff’s bar.

How might GL insurers respond to such suits?

- Threshold question: Is an allegation that the insured caused people to contract coronavirus an “occurrence” or accident under the GL policy?

The relevant terms of the GL insuring agreement promises to pay for “bodily injury” caused by an “occurrence.” An “occurrence” is usually defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Whether “bodily injury” from the alleged failure to prevent exposure to coronavirus is caused by an accident will generally turn on whether the insured foresaw the claimant’s injury. We wouldn’t expect claim facts to demonstrate a policyholder chose to intentionally cause a foreseeable harm. Rather, many situations will likely involve an element of fortuity supporting the position that there was, in fact, an accident. Some insurers, however, may argue otherwise, given the many warnings about the need to take action to prevent exposure to coronavirus. The facts will play a large role in determining whether a particular coronavirus infection was caused by an “occurrence.”

- Do any exclusions put the loss outside the scope of coverage?

- Communicable Disease Exclusions

GL exclusions for communicable diseases exist in the marketplace. The wording of these exclusions vary, with some focusing on bacterial disease versus viral infections. Depending on the wording, they may bar coverage for coronavirus claims. Fortunately, this exclusion is not commonly found in GL policies.

- Fungi / Mold / Mildew / Yeast / Microbe Exclusions

While these exclusions are often referred to as “mold” exclusions, they can impact more than fungi. These types of exclusions often exclude fungus, mold, mildew and yeast. In some instances, they include bacteria, and less frequently, viruses.

Scientists debate whether a virus constitutes a living microbe, and thus whether a microbe exclusion would bar viral claims. One of the indicia of life is the ability to procreate. A virus lacks this capability. It must latch on to a living cell and use that cell’s processes to multiply. This distinction could prove important for coverage, depending on the wording of a given exclusion. Even if coronavirus were considered a microbe, there may be an exception to the exclusion that restores coverage for microbes that were transmitted directly from person to person. This exception could bring person to person COVID-19 exposures back into the scope of coverage. Policyholders could still face challenges if person to surface to person transmittals are alleged in a complaint.

- **Pollution exclusions:** we expect policyholders to take the position that COVID-19 occurs in nature, and not as a consequence of traditional environmental pollution, and that therefore it is not a pollutant. There are also issues around whether viruses are discharged or released, terms of art incorporated within the pollution exclusion. Some states limit the definition of release to the definition found in environmental laws. Other jurisdictions give the term a broad meaning
- **“Expected or Intended” exclusions:** for a claimant to establish liability, it might require an unusual set of facts that alleges egregious behavior on the part of the policyholder. If that were the case, an insurer might reference the GL policy exclusion for injury “expected or intended” from the standpoint of the Insured. Insurers, however, have a high factual burden to meet in order to apply this exclusion
- **If coronavirus claims represent covered “occurrences,” how many different “occurrences” are presented by a given claim?** The number of occurrences involved in a matter can directly influence how deductibles and self-insured retentions apply and when policy limits have been exhausted. Courts generally apply either the “cause test” or the “effects test” to determine the number of occurrences. Most jurisdictions apply the cause test, which focuses on the underlying circumstances that resulted in harm, rather than the number of persons or properties ultimately harmed. The minority effects test focuses upon the resulting harm, rather than proximate causation. Some GL policies will contain “batch” wording that seeks to group certain losses into a single occurrence. That wording will need to be reviewed carefully if and when claims are filed.
- What factor will influence these issues?
  - **Choice of Law:** insurance is a creature of State law. Therefore, the benefits provided under a given policy can vary greatly, depending on which jurisdiction’s law is applied to its interpretation. Sometimes the policyholder and its insurer will “race to the courthouse” to try to obtain the most favorable forum. If a policy contains a choice-of-law provision, courts usually consider it controlling in most instances. Historically, where there isn’t such a clause in a policy, the law of the place of contracting (e.g. where the policy was issued) would usually govern contractual disputes under that policy. In some States, this could also mean the State where the insurer’s underwriting department is located. In contrast, the Restatement of Conflicts of Laws, upon which other States rely, considers the law of the principal location of the insured risk during the term of the policy to be controlling, unless some other State has a more significant relationship with regard to a particular issue.

## Environmental Liability

Over the past decade the environmental insurance marketplace has experienced significant claims (both in number and severity) involving Indoor Air Quality (IAQ) issues. While pollution coverage may still be available for bacteria and viruses, coverage is limited to certain scenarios, and often only address clean-up and disinfection costs. If coverage is provided for bacteria and viruses (and there is no specific exclusion addressing COVID-19), the carriers generally limit the scope of coverage in the following ways:

- **Insured Property**– sites owned by the First Named Insured to which the purchased coverage applies. No coverage exists for a Pollution Condition (including a potential release of a virus or bacteria) that occurs at a facility that is not an Insured Property
- **Definition of Pollution Condition** – several carriers will include Bacteria and Viruses as a “Pollution Condition” but solely as respects clean up or disinfection costs. For those carriers, therefore, there is no affirmative coverage for bodily injury, property damage, or business interruption. Only a few carriers include bacteria and viruses within the definition of “Pollution Condition”, without narrowing the scope of coverage
- **Separate Insuring Agreement** – a “Disinfection Event” has its own single-event scenario insuring agreement (usually limited to clean up only) and exclusions (most restrictive)
- **Environmental Laws** – typically, environmental policies provide clean-up costs to the extent required by environmental laws, although some may also include coverage for remediation performed by the directive or order of an administrative agency (i.e. per the direction of CDC or Health Department) in absence of environmental laws. Since there are no environmental laws governing the remediation standards for COVID-19 – coverage would only apply if the latter provision is included in the form
- **Disinfection Event**– often, a separate insuring agreement (defined separately from Pollution Condition) provides Clean-up Costs, but only those arising from Facility-Bourne Illnesses/Healthcare Associated Infections. Coverage may be further restricted by Time-Element provisions, or by other exclusions such as Communicable Disease/Human to Human Contact/Bodily Fluids Exclusions. Some Disinfection Event Exclusions specifically restrict costs associated with the disposal of corpses or body parts
- **Facility Bourne Illness/Healthcare Associated Infections** – a f usually relates to the method by which an illness or infection may be covered – i.e. contracted directly from viral or bacterial contact at a facility and not directly from another human
- **Communicable Disease/Human to Human Contact/Bodily Fluids Exclusion** – relates to the method or media by which an illness or infection is excluded. Can be applied to all insuring agreements or specifically to Disinfection Events coverage

### Evaluating potential claims and noticing carriers

Depending upon the coverages afforded under the policy and the specific reporting provisions, the recommendation to Insureds is that if there has been a known Emergency Response or Disinfection Event at a location, notice should be provided to the carrier for Pollution Legal Liability policies. For Emergency Response, policies include reporting provisions of within 7 days of commencement of the Pollution Incident, and 14 days after the discovery of such Disinfection Event. To move forward with noticing a Disinfection Event on your behalf to insurers, please provide the desired claim contact, the

Covered Property where the Disinfection Event took place, the date of the event, and the dollar amount of Disinfection Expenses incurred (if available).

For Contractors Pollution Liability policies, each policy should be reviewed for current projects as the same Disinfection Event coverages may not be afforded in the same manner as Pollution Legal Liability policies. If the company is aware of any current projects undergoing clean-up or disinfection events, the specific policy in place should be reviewed and the event should be reported if the coverage is available.

As respects Business Interruption coverage under Environmental policies, per the commentary above, most policies will not provide coverage for virus as a Pollution Condition. However, if there are measurable losses resulting directly from the impact of COVID 19 (i.e. clean-up costs, lost income and/or extra expenses incurred), we are recommending policyholders consider placing their environmental insurers on notice to preserve obligations around notice of claim requirements.

Many Environmental policies are on a claims-made and reported basis; therefore, evaluating the decision to notice carriers should be weighed carefully. As with other lines of insurance, any notice will likely yield an extensive information request as there will be an obligation to substantiate the claim.

To move forward with noticing insurers on your behalf, carriers will require the following information:

**INSURED:** XXXXXXXXXX

**POLICY TERM:** XXXXXXXXXXXXXX

**POLICY NUMBER:** XXXXXXXXXXXXXXXXXXXX

**LOCATION OF LOSS:** XXXXXXXXXXXX

**DATE OF LOSS\*:** XXXXXX

\*We would suggest using the first date that the virus was present at a location if that applies. Otherwise, the first date that your business was impacted by civil authority actions closing or restricting business.

**DESCRIPTION OF LOSS:** *EXAMPLE:* Adverse consequences related to the coronavirus at the location with a confirmed presence of the virus.

**CONTACT:** XXXXXXXXX

ADDITIONAL LOCATIONS MAY BE ADDED TO THE CLAIM AS THE SITUATION DEVELOPS

## Management and Professional Liability Policy

Directors and Officers (“D&O”) and Errors and Omissions (“E&O”) insurance broadly covers directors and officers for acts or omissions committed (or allegedly committed) in their official capacities, and the entity for management and professional liability claims, unless other policy wording, such as exclusions or other limitations, restrict such coverage. This form of coverage can be contrasted with forms of insurance that only cover a loss or peril that is specifically identified in the policy.

Generally, the risks associated with professional liability are among the many risks that are top of mind. In the context of this pandemic, the risks may include:

- The adequacy and accuracy of disclosures in a financial/ business environment with so much in flux, including many businesses trying to cope with shutdowns and other unprecedented pressures.
- Fiduciary and other duties owed. Changes are occurring quickly and there is no real precedent for many difficult decisions.
- Complications and challenges in balancing the needs and priorities of today’s diverse and complex interests among key stakeholders.
- Regulatory and compliance uncertainty in facing unparalleled events and responses by authorities.
- Workforce and operational adjustments bring new, potentially unanticipated risks.
- Legal, financial and other external advisors may be overtaxed or unavailable as many others are wrestling with COVID-19 related issues.
- Reputation risk arising from perceptions, well-founded or not, of how management has responded to the pandemic.
- With a global recession, cascading bankruptcies will disrupt entire industries and economies. Previously well-performing businesses are confronted with mandated closures, seemingly insurmountable workforce challenges, and cash management concerns. Meanwhile, the advancement and indemnification protections executives typically rely on to protect themselves may not be available when they need them most.

D&O renewals are becoming more challenging by the week with rate increases that have not been seen in 20 years. These changes are happening on the heels of an already firming, and in some segments, hard D&O insurance market. Adding to the mix of firming conditions, COVID-19 presents evolving dimensions to renewal challenges. For starters, in advance of renewal, especially those in the near term, insureds should expect heightened underwriter focus on COVID-19 impact, plans and disclosures. So far, top D&O underwriting areas of focus are liquidity and industry segment. Inquiries may be tailored to company-specific concerns or they be limited to a consistent COVID-19 questionnaire that asks the same questions of all policyholders. Inquiries may also drill down on COVID-19-related risk disclosures, the impact on financial results, operations, product/services shortages, industrywide concerns, liquidity/solvency, and cyber security. For some companies, insurers may attempt to modify terms that were, several weeks back, formally or informally quoted or conveyed.

## Health & Benefit Considerations

There are employee benefit-related consequences of changing employee status in response to COVID-19. When employers change an employee's status with terms like "furlough", "layoff" or similar language, employers must define what the terms mean with regard to employees' continuing employment.

### Employment status

- Employer must determine what "furlough" or "layoff" or similar term means in regard to their own employee status
- Is the employee continuing in employment or is the employee's employment being terminated?

### Group Health Plan Coverage (GHP)

- Furlough or layoff or other temporary employment status change does not mean that coverage under an employer's GHP will terminate
- The terms of the GHP will govern the extent to which health plan coverage continues.
- Employers with fully insured plan will need to consider the term of their insurance carrier contracts
- If changes are made to accommodate an emergency situation these terms must be reflected in the plan documents and summary plan descriptions

### Considerations for GHP

ACA-full-time status is determined based on:

- Employer's designation of the employees as full-time when the employer hires the employee with the reasonable expectation that the employee will be working full-time – averaging at least 30 hours per week or the number of hours worked in a prior measurement period
- If in connection with a furlough, layoff or other temporary employment status change and employee remains employed with an employer and the employer fails to offer regular active-full time (averaging 30 hours per week) the employer must continue to offer the employee regular active full-time employee health plan coverage until the end of the employee's stability period

### COBRA

- A furlough or other temporary employment status change that does not result in an employee's termination of employment is not a COBRA qualifying event unless the employee loses Group Health Plan coverage in connection with that employment change
- If the temporary employment status change results in a loss of GHP (most likely to reduction in hours, less than 30 hours per week) then the employer must issue a COBRA qualifying event and election notice and allow the affected employee to elect COBRA continuation coverage

- When a furlough or layoff employment status change results in an employee's termination, a COBRA qualifying event will have occurred. As a result, the employer must issue a COBRA qualifying event and election notice to the employee

## Premium payment

- If an employee is not paid during a furlough or other temporary employment status change that does not result in the employee's termination of employment and employer will need to consider how to handle the employee portion of the premium or cost of GHP coverage. Employers can elect to:
  - Reduce or waive the employee portion altogether
  - Arrange to have the employee's pay the employee portion by check or other means outside of the payroll process
  - Allow employee to make up the employee portion after the change in employment status had concluded

For additional information please refer to the Appendix, *Furlough and Lay off issues Chart* and *COVID-19 Global Human Capital Road Map*

# Premium returns and premium flexibility for property and casualty programs

As many of our clients have been negatively affected by COVID-19, our team has been pro-actively exploring all means to provide return premiums for reduced exposures as well as seeking extended and flexible payment terms. As each of our clients has a unique risk profile and have been affected in different ways by COVID-19, there is no blanket solution currently being offered by insurance carriers. Most insurers are reacting in an empathetic, constructive and collaborative manner to our requests to address the challenges our clients are facing. However, there are challenges as the effects of COVID 19 continue to evolve. Please review the below steps we are actively taking as well as the challenges faced for each line of coverage.

## Property

- Many insurers are willing to consider premium adjustments due to the material impact that COVID-19 is having on business income (BI) exposures
- One of the challenges of amending business income values is the uncertainty around the event and the length of time that it'll continue to impact an insured's business -- this makes the task of projecting business income values (which is the basis upon which premiums are calculated) tricky
- Our team's recommended approach is to make the adjustment retroactively, at the end of the policy period, when the actual BI exposures are known as there is better certainty to gain maximum credit
- For policies that are renewing over the next few months, the adjustability of premium based on changes in business income exposures should be addressed up front with insurers so that all parties can agree in advance on reasonable premium adjustment procedures
- Carriers are being flexible in providing extended payment terms beyond the standard 30-day window with some carriers agreeing to 45 or even 60 days
- Premium financing is also available to help spread the costs out over several installments rather than one lump sum payment

## Workers' Compensation

- Workers' Compensation policies are auditable and premium will be adjusted at expiration
- If business is closed and operations shuttered due to COVID, some carriers are willing to make mid-term adjustments (but not all carriers will agree to this)
- Some carriers are being flexible in providing installment payment plans (monthly or quarterly) at no charge

## Automobile

- Commercial carriers are not offering blanket discounts or return premiums as many personal auto insurers are

- If fleet is being reduced or being pulled out of service, most carriers are willing to provide return premium for the amount of time out of commission
- In the event minimum premium provisions are in place, most carriers have been willing to reduce minimums if insured can illustrate impact of COVID on fleet
- Carriers are being flexible in providing installment payment plans (monthly or quarterly) at no charge

## General Liability

- Most policies are auditable and based on exposures such as revenues or square footage
- Return premiums are being offered at audit (which will occur post-policy expiration), but in some instances we have been able to procure mid-term premium credits where business has basically shutdown
- Carriers are being flexible in providing installment payment plans (monthly or quarterly) at no charge

## Umbrella and Excess Liability

- In most cases, extremely challenging to procure return premiums
- Umbrella carriers are focused on the catastrophic loss, which can still occur, even with reduction in exposures

## Letters of Credit

- Credit officers are being extremely conservative as they are focused on the financial strength of the insured
- Most (not all) of our insured's financials are being negatively impacted by COVID

# Appendix



# COVID-19: Corporate Risk and Broking Road Map

## Responding to the COVID-19 pandemic

### Overview

The COVID-19 pandemic has disrupted business globally and is a rapidly evolving event.

The pandemic has underscored:

- The impact of proactive business continuity planning
- The importance of strategic risk management and well-designed risk transfer programs
- The value of strong relationships with the insurance market

### Guiding principles

1. The global market is functioning. North America, London, Bermuda, European markets and Asian markets have been able to work remotely.
2. Be aware of market conditions. There may be impact to certain industries, tightening of terms and conditions, and some underwriters may be slow to quote new business. Stay on top of market updates to know where your risk stands.
3. The underlying theme from insurers around the world is they are handling issues 'case by case'. When it comes to coverage extensions, mid-term changes, collateral issues, etc., all carriers are considering the individual circumstance of their insureds.

### Key stages of action

Broadly speaking, the pandemic will unfold in three stages for an organization.



## Managing through the crisis: React - Adapt

	Issues	Solutions
<b>Mitigate risks</b> 	<ul style="list-style-type: none"> <li>▪ Insureds should comply with all governmental directives to reduce potential harm and mitigate potential liability.</li> <li>▪ Follow business continuity plans.</li> <li>▪ Protect employees by encouraging remote work.</li> <li>▪ Protect facilities, buildings, etc. if required to temporarily vacate or shutter.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Comply with all policy conditions. Note especially warranties, vacancy clauses, consent provisions, etc. Also, it is important to inform insurers of material changes in risk due to significant changes in operations.</li> <li>▪ Leverage <b>Ergonomics</b> to assist employees as they work from home and minimize workers' compensation exposure.</li> <li>▪ Consult a <b>Property Risk Control</b> expert regarding loss prevention in idle plants, boiler inspections, vacated buildings, etc.</li> <li>▪ <b>Supplemental healthcare coverage.</b></li> </ul>
<b>Preserving capital</b> 	<ul style="list-style-type: none"> <li>▪ The length of restrictions due to COVID-19 may make incoming revenue streams and cash flow uncertain.</li> <li>▪ Companies may be required to revisit their recent guidance to determine if outstanding liabilities will be materially impacted by COVID-19.</li> <li>▪ COVID-19 may impact the short-term financial performance of businesses.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Consider <b>Premium Financing</b> as an option to help preserve working capital during this uncertain period.</li> <li>▪ Consult with actuaries to revisit <b>Accruals</b> and revise assumptions.</li> <li>▪ <b>Plan now for 7/1 renewals</b>, remodel your exposures and determine if your insurance and risk management structure is optimized for the future and tuned to new financial realities of the business.</li> </ul>
<b>Claims</b> 	<ul style="list-style-type: none"> <li>▪ COVID-19 will undoubtedly result in the need for clients to prepare, quantify and resolve large and complex claims.</li> <li>▪ COVID-19 may result in damages sustained by entities across all industries. The resulting financial damages sustained should be addressed, captured and quantified.</li> <li>▪ Due to the declaration of a national emergency due to COVID-19, assistance for qualifying organizations (such as public entities) is available from FEMA.</li> </ul>	<ul style="list-style-type: none"> <li>▪ <b>Accelerated Claims Closure</b> projects should be considered for organizations in favorable cash position.</li> <li>▪ Our <b>Forensic Accounting and Complex Claims (FACC)</b> team can assist clients in quantifying the economic damages sustained from COVID-19.</li> <li>▪ Forensic Accounting and Complex Claims can provide <b>FEMA assistance</b> to help clients navigate and submit to the FEMA claims process.</li> </ul>

## Managing through the crisis: Sustain

	Issues	Solutions
<p><b>Focus on efficiency and cost reduction</b></p> 	<ul style="list-style-type: none"> <li>COVID-19 may result in prolonged uncertainty to global economic and insurance market conditions.</li> <li>The need to preserve cash and reduce costs will become more critical in difficult economic situations. As such, an integrated approach to reducing an organization's total cost of risk will be important.</li> </ul>	<ul style="list-style-type: none"> <li><b>Integrated Casualty Consulting</b> – ideally suited to assist clients improve efficiency and effectiveness of their risk processes and reduce <b>Comprehensive Cost of Risk (CCOR)</b> in a volatile market.</li> <li><b>Remodeling your exposures to loss</b> given your new operating model can reduce insurance premiums at renewal.</li> <li>Engage <b>Alternative Risk Transfer (ART) solutions</b> to spread limited capacity across multiple lines of cover and achieve limits within constrained budgets.</li> <li>Consider <b>Multi-line / Multi-year rate lock</b> programs to stabilize rate and restore financial statements.</li> </ul>
<p><b>Use advanced tools and data to drive decisions</b></p> 	<ul style="list-style-type: none"> <li>Adjusting plans and risk management strategies during COVID-19 will be important to maintain the financial flexibility and viability of companies.</li> <li>Data and analysis can help guide companies through the pandemic and enable decision-making to adjust plans as necessary to optimize the cost of risk relative to financial performance.</li> </ul>	<ul style="list-style-type: none"> <li><b>Market security reviews.</b></li> <li>Our comprehensive suite of <b>Risk and Analytics</b> capabilities can help clients leverage data wherever they are in their analytical sophistication to facilitate effective, rational, and defensible decision-making.</li> </ul>

Each applicable policy of insurance must be reviewed to determine the extent, if any, of coverage for COVID-19. Coverage may vary depending on the jurisdiction and circumstances. For global client programs it is critical to consider all local operations and how policies may or may not include COVID-19 coverage. The information contained herein is not intended to constitute legal or other professional advice and should not be relied upon in lieu of consultation with your own legal and/or other professional advisors. Some of the information in this publication may be compiled by third party sources we consider to be reliable, however we do not guarantee and are not responsible for the accuracy of such information. We assume no duty in contract, tort, or otherwise in connection with this publication and expressly disclaim, to the fullest extent permitted by law, any liability in connection with this publication. Willis Towers Watson offers insurance-related services through its appropriately licensed entities in each jurisdiction in which it operates. COVID-19 is a rapidly evolving situation and changes are occurring frequently. Willis Towers Watson does not undertake to update the information included herein after the date of publication. Accordingly, readers should be aware that certain content may have changed since the date of this publication. Please reach out to the author or your Willis Towers Watson contact for more information.

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# How will COVID-19 affect the Trade Credit Markets?

In the 12 months prior to the COVID-19 pandemic, the Trade Credit industry had begun to prepare for an economic downturn/correction that many predicted would begin in 2020. During this time, most insurers reviewed their portfolio and started to make capacity and premium adjustments accordingly to prepare for the downturn.

The outbreak of COVID-19 not only accelerated this downturn/correction but will almost certainly crystalize losses for the Trade Credit insurers. The associated shutdowns are testing the resources and the solvency of many companies as they continue to weather the storm. Some companies will be able to make the necessary adjustments to their business models and have access to the needed liquidity, while others will not fare so well. The key questions that most of these companies face are:

- *How long can they sustain their business based on their current cash level?*
- *What is their current availability with their credit facility?*
- *How much access do they have to alternative sources of capital and how easily is it obtained?*

Many companies have fully drawn down on their credit lines to preserve cash prior to potentially breaching any covenants and to ensure that they have the cash needed to fund their business through the duration of this pandemic crisis.

Smaller companies may not have access to additional cash and may need to manage their daily operations with their current cash position. They may have a hard time sustaining their business if the re-opening of the world economy doesn't start soon. Many, unfortunately, will fail and declare insolvency.

In the Trade Credit industry, **the insolvencies have technically occurred but have yet to be crystalized and reported.** As this economic standstill prevails, we will continue to see an increase in insolvencies as more companies find they cannot survive the liquidity crunch.

This crisis may fundamentally change many business models but until the economy re-opens and we begin to understand how consumers will behave in the new environment, it's pure speculation as to what the future may be for each business.

## Trade Credit Insurer Reaction – Cancelable Limit Insurers

Cancelable limit insurers are taking strategic action to adjust future coverages on weaker risk-rated buyers in trade sectors and geographic areas hardest hit by the effects of the global pandemic. All insurers are preparing for a dramatic spike in insolvencies worldwide. We have seen increased buyer reviews, reductions and cancellations of limits as well as very conservative underwriting for new limit requests.

For policies with upcoming renewals that involve troubled sectors and country exposures, insurers are considering non-renewal notices. Although the insurers would normally take into account the strength of insured/seller, policy premium, structure and historical claims ratio before taking limit actions or non-renewing policies, the dramatic deterioration and unprecedented uncertainty of the credit environment requires an increased scrutiny of the buyer risks.

All three of the global monoline credit insurers have shown flexibility in increasing their overdue debt reporting requirements. They are updating their underwriting positions as actual overdue debt reporting and claim filing activities materialize, in addition to projecting the future economic

effects of the pandemic. WTW's Trade Credit professionals emphasize that advance notice should be provided from the insurers while maintaining continuous dialogue with our clients to facilitate the reconsideration and/or maintenance of critical buyer limits that might otherwise be cancelled.

The most affected sectors include:

■ Agrifood	■ Oil & Gas
■ Travel and aviation	■ Retail
■ Leisure and Hospitality	■ Services
■ Construction	■ Textiles
■ Metals	■ Transportation

The delayed effect endorsements that have been issued by the cancelable limit carriers, which were a direct result post the 2008 downturn, is creating a much softer landing for policyholders by delaying the immediate impact of reductions and withdrawals – except where the information is materially adverse.

## Trade Credit Insurer Reaction – Non-Cancelable Limits Insurers

The advantage of the non-cancelable limit insurers' policies is clear during these times as insureds are not impacted by multiple limit reductions or cancellations by the insurers. However, such policies are based around best practice credit management thus the insured retains the due diligence obligation to cease shipment or cut their own discretionary credit limit in the event of non-payments or receipt of negative information, therefore, becoming an automatic withdrawal. Typically, the threshold is set for a "stop shipments" clause if overdue debts go beyond 30 to 60 days depending on the trade sector and normal terms of payment.

In highly impacted sectors, insureds will need to be judicious and follow their own credit procedures and their policy wording regardless as to whether or not the limit is cancelable or if the cease shipment clause is not yet triggered. To retain cover the insured must not ship where there may be knowledge or information of any circumstances that may reasonably be expected to result in a loss.

Given the abruptness and depth of this shutdown, this conditionality creates serious pressure on the insured

to stay within the rules and limitations of a trade credit insurance policy. As this is an unprecedented situation, it is very difficult to forecast the future as no one has modeled for a pandemic. Which begs the question – is coverage on your non-cancelable limits policy in place for the most negatively impacted sectors?

This pandemic and subsequent insolvencies will certainly test this section of the non-cancelable limit policies and will be something that we follow closely. Our regular advice to our insureds is to initiate discussions with your insurer, outline the issues and processes undertaken to manage risk and arrive at a documented consensus in areas where there is doubt.

## Insurer Reaction - 2008 Crisis vs. COVID-19 Pandemic

There are some economic similarities present when comparing these two downturns. Uncertainty drove much of the reaction in both downturns. Currently, we are uncertain as to how deep COVID-19 will run, just as we did not know how toxic the sub-prime loans were and how adversely they would impact the financial institutions in 2008.

The reaction to COVID-19 was softened primarily due to the fact that insurers were predicting a global market correction or downturn prior to this pandemic and already had a good handle on the risk within their portfolio. The government mandated shutdowns have triggered further reductions and cancellations, which in many cases then aligns with reduced global demand in these sectors.

During the 2008 crisis, much of the market was caught by surprise which resulted in massive amounts of limit reductions and cancellations without notice. These risk review exercises were effective on the day of the notice by the insurer, leaving the insured unprotected for goods that were prepared for shipment or committed to future shipments.

This stain on the industry was addressed, post crisis, with the invention of the delayed effect endorsement by the cancelable limit insurers. This endorsement allowed an insured 30, 60, 90 or even up to 120 days, in some cases, to continue with insurance coverage, after a cancellation is received, unless a default event had already occurred. This delayed effect endorsement has created a soft landing and a more manageable situation for many companies currently impacted by reductions and cancellations from the cancelable limits insurer.



In this crisis most insurers have also demonstrated greater flexibility and understanding of the pressures faced by insureds to collect due receivables and maintain the supply chain while economic activity remains temporarily frozen. Many insurers have permitted longer discretionary extensions of credit terms and past due/overdue debt reporting. However not all insurers have offered the same levels of discretionary extension even within the same global group, so please check with your trade credit professional at WTW or the insurer. For policies outside the top three global insurers or where no circular notice is received please ensure any reporting and due date extensions beyond the policy parameters are discussed with us and your policy is amended individually to reflect any variation to the policy limits.

## New Business Submissions

The insurers are extremely selective in reviewing any new business opportunities. They have all indicated that binding and we note the following:

- *The insurers will require a deeper level of information to bolster and support their position prior to providing indications of terms.*
- *Risk and commercial decisions will require more senior involvement and escalation prior to release.*
- *Indications will only be valid for approximately one or two weeks given the fluidity of the market.*
- *It will be difficult to effectively market or remarket policies in sectors that are heavily impacted.*
- *Backdating of coverage to even the beginning of the month is not currently possible.*
- *Policy extensions to finalize remarketing efforts are not being as readily agreed.*

Insurers will likely be opportunistic or perhaps realistic with terms, conditions and coverage. However, their main focus will remain on their current customer base as they navigate through this crisis. Growing their book with new customers may be difficult as they struggle to predict the market and the risk impact of any new clients that they obtain.

## Managing Insureds & Renewals

During downturns, communication and transparency between the customer, insurer(s) and broker is paramount. The exchange of information will shepherd everyone through the crisis, thus maintaining the value of the policy.

On some of the larger policies we feel that regular weekly or at latest monthly calls with the insurer(s) are necessary. For those calls where they are not already occurring regularly, we would aim to circulate an agenda, share a current aging to show payment patterns and overdue debts/past dues and agree a course of action including work out plans, discuss ongoing coverage needs, and in due course provide updates on filed claims. Depending on issues, these calls may range from 15 minutes to an hour on the agreed schedules basis and may be documented by minutes if required. Executing this plan of action will allow all parties to ensure cover is maintained during this crisis while enhancing and strengthening the relationships.

Renewal premium rates will most likely increase – perhaps from 5% up to 20% or more depending on the industry and loss experience. Insurers are motivated to retain and manage their customers throughout the duration of this downturn so coverage levels and policy structure such as deductibles may be more relevant than simple premium increases to weather this crisis while maintaining and strengthening relationships.

*Carriers are motivated to retain and manage their customers throughout the duration of this downturn.*

## Reinsurance

During any economic downturn, the focus turns to the ratings of the insurers. While these ratings are very important it's also important to understand the reinsurance arrangements that these insurers have in place.

All insurers have significant reinsurance in place to spread the risk and protect their capital base. These arrangements are confidential; however, you may be able to get a sense of the percentage that they cede to the reinsurers and the level of the stop loss treaties from announcements from your insurer or via WTW.

In most cases, the insurers will have a stop loss treaty ranging from of \$2.5 million or \$10 million to limit the impact of any single event on their capital base and loss ratios. On top of this they will have a treaty in place that cedes upwards of 50% of their losses to a pool of reinsurers. The lead reinsurers typically carry high investment grade ratings.

While reinsurance rates will rise after a downturn, we have also seen renewed interest from other reinsurers to join the Trade Credit market, precisely because rates will rise. The best time for a reinsurer to engage is on the back end of a downturn. This allows them the opportunity to build premium and experience until the next cycle.

## Government Reinsurance Schemes

During the 2008 crisis, France led the way with a government backed reinsurance scheme to help support limits for French companies.

In the current COVID-19 crisis, most of Europe is setting up similar arrangements as the insurers engage with the various governments to arrange support that will help maintain limits to their local companies. Germany and France have already announced EU approved and multi million Euro levels of reinsurance support of the credit insurers to maintain pre crisis levels of cover given how important credit insurers are to the working capital needs of the supply chain. The UK, Ireland and the USA are currently pressing similar cases with their respective governments.

It's important to note that these are not "bail-outs" for the insurance industry but rather reinsurance support for insurance companies to maintain coverage which are helping SME, middle market and large global companies maintain trade on open terms. In 2008, the French government generated a profit from this arrangement and provided a win for all involved.

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# What should construction risk managers be considering in light of the COVID-19 pandemic?

**The COVID-19 (coronavirus) pandemic has impacted and will continue to bring lasting effects to the insurance marketplace. Specific to construction project risk, the fundamental availability of insurance coverage and contractor's, developer's or owner's abilities to initiate building, continue building and complete projects on-time and on-budget will be affected. While the magnitude of impact for the construction industry may not be known for some time, we fully anticipate challenging times ahead.**

In the past several days we have seen unprecedented actions:



Projects being shut down by local municipalities to limit human contact and potentially curtail the overall spread of the pandemic



Proforma project financing being withdrawn as lenders more closely scrutinize project viability



Forecasting of significant delays in the supply of materials both from international as well as domestic suppliers

Singularly or in combination, any one of these disruptions will have significant consequences on project scheduling and ultimately amplify the overall risk associated with a project.

While many of our clients, colleagues and partner carriers are sequestered and practicing social distancing, we remain in constant communication as we collectively work through these challenging times. We've connected with our largest trading partners to assess the potential availability of casualty coverage both for current programs and those on a prospective basis and the potential impact on current and future insurance pricing indications.

## What should Risk Managers be considering?

While the availability of specific coverage pursuant to COVID-19 is ambiguous in many respects, to prepare for challenges ahead there are a number of steps risk managers should be considering now to mitigate future risk. Actions necessary will vary based on where a risk is situated in the construction continuum.

Phase	Concern	Action
<b>Project conception</b> ■ Pre bid ■ Pre award	Reliability of previously received risk transfer pricing for budgets	Refresh any project insurance pricing quotations/proformas received within the last six months to assure viability of pricing. Formal project quotations are typically valid for 30 days, and most carriers will not extend quote terms beyond this time period without the ability to re-price.
	Broader financial concerns could impact ability to secure more favorable collateral requirements	For projects subject to larger retentions where collateral is required to secure deductible obligations, we should anticipate a more stringent process moving forward on obtaining paid loss credits (deferrals). Insureds should likewise not automatically rely on the availability of cross collateralization with practice programs.  Risk managers should dedicate time and personnel during the quoting phase to incorporate a credit review with the carrier(s) to effect the desired results. For privately held companies this could translate to increased access to financial information to assure markets of company stability/wherewithal.
<b>Project mobilization</b> ■ Preconstruction ■ Procurement	Delay in project kick off	When a project start is delayed, obtain formal quotation extensions from the respective carriers to assure viability of pricing. Willis Towers Watson continually monitors pricing fluctuations and will be able to provide guidance.
	Labor constraints	Depending on governmental mandates, geography and population infected therein, the ability to command and call upon the workforce previously anticipated may be compromised. In an industry already challenged for talent, project managers may lose access to the anticipated workforce due to mandatory quarantines, lack of childcare or eldercare, or worse yet - sickness.  For programs inclusive of workers compensation coverage or rated on a payroll basis, consider seeking modifications to minimum premiums and/or audit provisions to avoid or reduce potential premium penalty.
<b>Construction/performance</b>	Project cessation	Develop a plan for project shut down on both a short-term and long-term basis. General liability policies have exclusionary language pertaining to project abandonment, thus it is critical to discuss project security with the carrier to reduce the potential for coverage to be voided. Willis Towers Watson can guide you through this process and discussions with carriers. Specifically, if a project is shut down, it will be mandatory that you have a contingency plan in place for securing the site. The site should be completely fenced and monitored. Materials should be secured, and tower cranes dressed or dismantled.
	Delays in project completion or acceptance	If project completion is going to be delayed it will be necessary to obtain policy extensions. Currently, Willis Towers Watson's larger carrier trading partners are generally committed to offering project extensions and willing to "be flexible" on terms. That said, the earlier the negotiations begin the better to allow time for the best terms to be obtained.  A cautionary note: while we are confident that extensions will be available, in a tightening insurance market we expect rate increases as well as potential restrictions in coverage. Policy extensions typically include a charge for both duration as well as additional values associated with project completion. It will be important to thoroughly describe the reasons for the cost increases.  Increased cost of labor could be the result of a larger labor force required to complete the project. This is a different component of risk than construction value of the project increased.
<b>Completion/turnover</b>		

In addition to the risk transfer and insurance strategies described above, it is critical that risk managers review contractual obligations regarding the impact on project scheduling attributable to the onset of COVID-19 and seek legal counsel accordingly. Insurance treatment of financial costs of project delays attributable to COVID-19 are nebulous. In conjunction with legal counsel, contractual language for both executed as well as contracts currently being negotiated, should be analyzed.

Risk managers should also carefully scrutinize and evaluate terms, definitions and risks relating to schedules and delays, substantial completion, force majeure, and liquidated damages.

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# Builder's Risk considerations during the COVID-19 pandemic

*The COVID-19 pandemic is causing disruption and potentially lasting effects on the insurance marketplace. Specifically, in the construction industry, we have seen unprecedented actions in the past week:*



Projects being shut down by local municipalities to limit human contact and potentially curtail the overall spread of the pandemic



Project financing being withdrawn or revisited as lenders more closely scrutinize project viability



Forecasting of significant delays in the supply of materials both from international as well as domestic suppliers



Project starts are being delayed (or considering delay) in light of the general uncertainty in the macro environment

Disruptions such as these pose significant implications on the design, placement and response of builder's risk coverage for first party property damage and delay-in-startup exposures. The focus of this piece is to draw attention to key terms and conditions that could influence a policy's efficacy or response in these unprecedented circumstances. The placed policy is only one side of the equation, however, as heightened proactive measures should be implemented concurrently to mitigate the impact of any potential loss.

## Key terms and conditions relevant to COVID-19

In analysis of risk transfer avenues, the policy language remains the guidepost; however, for builder's risk, the coverage form is anything but uniform from one project (or from one carrier) to another. Brokers, markets and insureds must all be avid stewards of their policy language. Whether your project is impacted due to government ordered shut-downs, interrupted supply chains or delays in kick off or completion, a checklist of key items to revisit and review includes:

Concern	Coverage Review & Considerations	What should Risk Managers consider?
<p><i>Government ordered shutdowns of the project or work stoppage</i></p>	<p><b>Cessation of Work Exclusion or Limitation:</b> Many policies have a “cessation of work” exclusion or limitation which will void coverage if work is stopped for a reason other than what is outlined in the policy. Other policies may allow a cessation of work for a certain time period after which, coverage is void or is reduced.</p> <ul style="list-style-type: none"> <li>▪ This situation is arguably beyond the insured’s control so focus should be on advocacy against temporary suspension of construction activities during this period as a trigger for this exclusion. Either way, however it is highly recommended that the insured maintain and protect the project during the period when construction activities are suspended.</li> </ul> <p><b>Abandonment:</b> Similar to the cessation of work clause, some policies may contain an abandonment clause. Ensure that the situation related to your project does not constitute abandonment per the terms of the policy.</p> <ul style="list-style-type: none"> <li>▪ We anticipate most carriers will not consider the temporary suspension of construction activity due to COVID-19 as abandonment, however if the change in economic conditions results in the project being cancelled this condition could come into play.</li> </ul> <p><b>Increased Hazard:</b> The conditions section of the policy may contain an “increased hazard” clause which could void coverage if such increased hazard is not reported to the carrier.</p> <ul style="list-style-type: none"> <li>▪ Markets may consider the suspension of construction activities as a materially increased risk, therefore any foreseen shifts in schedule, scope, occupancy or values should be reported as soon as possible.</li> </ul>	<p>During a period of suspended construction activity, the following should be addressed:</p> <ul style="list-style-type: none"> <li>▪ Establish an open dialogue with your carrier(s) about the status, concerns, and measures you are taking. Being proactive will differentiate your risk.</li> <li>▪ Protect the site as much as possible, with enclosed and locked construction fences and site security with 24-hour watch service</li> <li>▪ Protection against wind and water damage (safety nets, bracing, covers, dewatering devices, etc.)</li> <li>▪ Temporary lighting shall remain illuminated</li> <li>▪ Stored equipment – follow manufacturer’s recommendations on maintaining idle equipment; temperature and humidity control, de-energize electrical equipment</li> <li>▪ Secure all cranes and other mobile equipment in accordance with manufacturer’s recommendations. Where possible all booms should be lowered.</li> </ul>
<p><i>Availability, changes or increased costs in the cost of materials or labor</i></p>	<p><b>Insurable Limits:</b> As potential disruption in the cost or availability of foreign or domestically sourced materials looms on the horizon, it is foreseeable that programs in place may be bound with insufficient insurable limit. The same can be said for the cost of labor associated with installation.</p> <ul style="list-style-type: none"> <li>▪ Most builder’s risk carriers will consider a coverage extension known as an “<b>escalation clause</b>”. Barring upfront known or foreseeable cost adjustments, this wording allows for an automatic increase in coverage limits should the final contract value exceed a stated percentage versus the original amount (typically 5% or 10%).</li> </ul>	<p>The escalation clause serves as a helpful backstop amid such uncertainty, however if new figures can be projected or subsequently manifest during the course and scope of construction, the best practice would be to report such changes as soon as practicable to the carriers to preserve the escalation clause for further, unplanned events.</p>

Concern	Coverage Review & Considerations	What should Risk Managers consider?
<i>Difficulty securing policy period extensions</i>	<b>Project Term/Extensions:</b> It is unknown how long projects may be impacted due to COVID-19, but we anticipate it is likely many bound programs will need to be amended and coverage extensions will be required. This should be addressed as soon as possible with the carriers.	It is imperative for policyholders to document the current status of the project prior to any interruption, as well as the duration of any suspension, and the potential impact on the project schedule once construction operations restart. This degree of information will facilitate your appeal for extension amidst a potential influx of similar requests.
<i>Project Cancellation</i>	<b>Cancellation Provisions:</b> It is foreseeable that some projects could get cancelled during the construction phase or perhaps even before work commences. <ul style="list-style-type: none"> <li>▪ While some policies are “non-cancellable,” the most typical timeframe is 30-90 days cancellation except 10 days non-payment of premium. The policy will outline the terms by which the carrier can cancel or will govern the conditions applicable when the insured initiates cancellation.</li> </ul>	If changing economic conditions results in the project being terminated and <b>the insured</b> cancels the policy, a thorough understanding of the policy for any short rate penalties or minimum premiums that may apply is strongly recommended.
<i>Cost and contract certainty in the pre-bid or pre-award phase</i>	<b>Indication or Quote Expirations:</b> Independent of COVID-19 developments, project indications and quotations are not to be considered open-ended. The viability of pricing, terms and conditions is finite until bound. <ul style="list-style-type: none"> <li>▪ Carriers will advise of an expiration date for the quotation (30 days being most typical). The duration of quote validity could be negotiable on the front end should additional time be required pre-binding. Brokers and risk managers need to closely monitor timelines as project dynamics change.</li> </ul>	With engagement of your broker, risk managers should expect to revisit any builders risk quotes or indications received within the last six months to assure viability of pricing and coverage. Furthermore, insureds should be preparing stakeholders internally and externally for the potential of pricing adjustments in this evolving landscape. The marketplace is not static and the impact of COVID-19 could escalate further hardening.

## Additional coverage terms and conditions

As a result of the COVID-19 pandemic, there are additional coverage terms and conditions that are emerging and could be avenues for potential coverage (or concern):

**Civil authority:** The coverage typically applies when an insured is unable to access its property due to a government order as a result of physical damage to adjacent or nearby property. As with the dialogue surrounding delay/business interruption, the coverage trigger is physical damage from a covered cause of a loss. Can the presence of a pandemic adjacent to or nearby a construction site constitute physical damage?

**Vacancy clause:** While this clause is rare in builder's risk forms, it is prevalent in fixed property programs. This requires further evaluation and discussion in the event a construction project is covered via a fixed property program with a course of construction extension.

**Emergency property protection expense and other coverages:** Close attention should be paid to all coverage extensions of policy, in particular those with broad scope and definition. Some policies include an extension for “emergency property protection expense” which is intended to move property to a secure location or to protect property in place. While most policies reserve this coverage for ‘imminent risk’ and named perils (flood and windstorm), others are more open ended.

In addition to the risk transfer and risk management strategies described above, it is critical that risk professionals review contractual obligations regarding the impact on project scheduling attributable to the onset of COVID-19 and seek legal counsel accordingly. Insurance treatment of financial costs of project delays attributable to COVID-19 are nebulous. In conjunction with legal counsel, contractual language for both executed as well as contracts currently being negotiated, should be analyzed and carefully scrutinized and terms, definitions and risks relating to schedules and delays, cost overruns / escalation, substantial completion, force majeure and liquidated damages should be evaluated as well. Willis Towers Watson can provide guidance as to specific insurance requirements and availability coverage. During this pandemic, all associates of the company are supplied real-time updates to content and thought leadership and likewise all associates are here to review and address any concerns our clients may have with builder's risk placements in effect or under consideration.

#### **Disclaimer**

*Each applicable policy of insurance must be reviewed to determine the extent, if any, of coverage for COVID-19. Coverage may vary depending on the jurisdiction and circumstances. For global client programs it is critical to consider all local operations and how policies may or may not include COVID-19 coverage. The information contained herein is not intended to constitute legal or other professional advice and should not be relied upon in lieu of consultation with your own legal and/or other professional advisors. Some of the information in this publication may be compiled by third party sources we consider to be reliable, however we do not guarantee and are not responsible for the accuracy of such information. We assume no duty in contract, tort, or otherwise in connection with this publication and expressly disclaim, to the fullest extent permitted by law, any liability in connection with this publication. Willis Towers Watson offers insurance-related services through its appropriately licensed entities in each jurisdiction in which it operates.*

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Willis Towers Watson (NASDAQ: WLTW) is a leading global advisory, broking and solutions company that helps clients around the world turn risk into a path for growth. With roots dating to 1828, Willis Towers Watson has 45,000 employees serving more than 140 countries and markets. We design and deliver solutions that manage risk, optimize benefits, cultivate talent, and expand the power of capital to protect and strengthen institutions and individuals. Our unique perspective allows us to see the critical intersections between talent, assets and ideas – the dynamic formula that drives business performance. Together, we unlock potential. Learn more at [willistowerswatson.com](http://willistowerswatson.com).



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## **Employee Benefits Issues to Consider When Deciding to Furlough or Layoff Employees**

Many employers are considering furloughs to quickly reduce payroll, hoping the current crisis lasts for only a few months at most. The term “**furlough**” generally refers to a temporary suspension from work without pay, often for a fixed period of time, where benefits are often continued to some extent and employees are expected to return to their jobs. Employees typically continue on the employer’s books as current employees, but as not being active and not being paid.

Other employers are considering layoffs and terminations. The term “**layoff**” refers to an indefinite, often permanent, break in the employment relationship. Benefits are often discontinued during the layoff. Laid-off employees are usually officially separated from employment and receive a final paycheck from the employer.

Below is a chart summarizing the effect of furloughs and layoffs on U.S. retirement plans and U.S. health and group benefits. **This is not an exhaustive list of all issues to consider. Each employer must evaluate the issues and review the terms of their plans as conclusions will sometimes differ depending on plan design and other factors (e.g., collective bargaining agreements). Clients should also be encouraged to seek the advice of their own legal counsel regarding legal issues, especially during this uncertain time.**

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	Issue	Furlough	Layoff
Defined Contribution Plans	Severance from employment for distribution purposes	Furloughed employees generally have not had a severance from employment for distribution purposes.	A layoff will result in a severance from employment for distribution purposes.
	Effect on employee contributions	Employee contributions to section §401(k) and §403(b) plans are based on the amount of pay received, so to the extent that employees are not paid during a furlough, they will not be entitled to make pre-tax, Roth or after-tax contributions.	Amounts received following severance from employment generally may not be treated as compensation for deferral purposes under section §401(k) and §403(b) plans, with certain exceptions (e.g., post-severance payments that are made by the later of 2-1/2 months following the employee's severance from employment or the end of the limitation year in which the severance occurs (i) that would have been paid to the employee anyway without regard to the severance from employment, such as regular pay, overtime pay, shift differential pay, commissions, bonuses, or other similar compensation, and (ii) if a plan so provides, payments that would have been included in the definition of compensation absent a severance from employment for unused leave and certain payments from a nonqualified deferred compensation plan). See <a href="#">memo 10031</a> .
	Effect on matching contributions	To the extent employees are not paid during a furlough (so can't make employee contributions), matching contributions will not be made.  For plans with allocation requirements (e.g., a 1,000 hours/year or a last day requirement), furloughs may prevent employees from receiving any match for the year.	For plans with allocation requirements (e.g., a 1,000 hours/year or a last day requirement), layoffs may prevent employees from receiving any match for the year.
	Effect on nonelective contributions	If contributions are made on a payroll-by-payroll basis, they would not be made during an unpaid furlough, but plan terms should be reviewed.  For plans with allocation requirements (e.g., a 1,000 hour or a last day requirement), a furlough may prevent employees from receiving any nonelective contribution for the year.	For plans with allocation requirements (e.g., a 1,000 hours/year or a last day requirement), layoffs may prevent employees from receiving any nonelective contribution for the year.
	Effect on service crediting	<u>Hours counting</u> – Employees do not earn hours of service if they do not perform services and do not receive compensation; as a result, they may not be entitled to a year of service absent a plan amendment.  <u>Elapsed time</u> – Leave of absence of less than 12 months will count as eligibility and vesting service.	<u>Hours counting</u> – If an employee is rehired, service during the period of the layoff is not counted as service. However, if the employee is terminated and rehired during the same plan year, service both before and after the layoff would count towards determining whether the employee is credited with a year of service for that plan year.  <u>Elapsed time</u> – If the individual is rehired and the period of the layoff is less than 12 months, the period of the layoff is counted as service for eligibility and vesting purposes.

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	Issue	Furlough	Layoff
Defined Contribution Plans	Effect on outstanding loans	<p>Some plan loan policies will permit employees to continue to make payments during a furlough or leave of absence, although this is administratively difficult since repayments will no longer be coming from wages.</p> <p>It is also possible under IRS rules to suspend loan repayments for up to a year when a participant is on a leave of absence, either without pay or at a rate of pay (after employment tax withholdings) that is less than the amount of the installment payments required under the terms of the loan. In such case, the loan (including interest that accrues during the leave of absence) must be repaid within the maximum period available for the loan (e.g., 5 years for non principal-residence loans). The missed payments may be repaid as a balloon payment at the end of the term or by ratably increasing the installments during the remainder of the repayment period. If the original loan term was less than the maximum permitted term, then the loan term could be extended to the maximum permitted term (five years in most cases) and the loan re-amortized over the extended loan term.</p> <p><u>Note:</u> Under the CARES Act, a plan may extend the due date of any loan payment otherwise due during the remainder of 2020 for “qualified individuals.” For this purpose, a qualified individual is an individual: (i) who is diagnosed with COVID-19 by a CDC-approved test; (ii) whose spouse or dependent has been diagnosed with COVID-19; or (iii) who experiences an adverse financial consequence due to being quarantined; being furloughed, laid off, or having hours reduced; inability to work due to a lack of child care; closing or reducing hours of a business owned or operated by the individual; or other factors as determined by the Secretary.</p>	<p>Most plans do not allow participants to continue making loan payments following termination of employment for administrative simplicity. However, plan sponsors may decide to support participants by allowing them to make repayments following termination (e.g., through ACH directly from a participant’s checking account or with a check).</p>
	Availability of new plan loans	<p>A furloughed employee may be permitted to take a plan loan. However, if eligibility to take a loan under the plan/loan policy is based on employment status or if loan repayments are required to be made by payroll deduction, an amendment may be necessary.</p>	<p>Plans rarely allow a terminated participant to obtain a new loan. due to the administrative complexity of handling repayments (e.g., by ACH or check instead of payroll deduction) and the possibility of a participant defaulting on the loan by failing to make payment.</p>

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	Issue	Furlough	Layoff
Defined Contribution Plans	<p>Availability of withdrawals</p>	<p>Only to the extent the plan permits in-service distributions and the participant meets the conditions. A plan generally may allow a participant to access their vested account balance at age 59 ½ or for the reasons set forth below. To the extent a plan does not already provide for one of these options, it may be amended to include the option by the end of the plan year in which it's effective (or later in certain cases as noted below).</p> <p><b>Hardship Withdrawals.</b> Available from a participant's vested accounts for specific hardship events. Most plans limit hardship distributions to the IRS "safe harbor" reasons. Relevant safe harbor hardship events may include: (i) medical expenses not covered by insurance (ii) payment of tuition, and (iii) monies to prevent eviction or foreclosure. The IRS recently added a new safe harbor hardship category for losses (including loss of income) on account of a disaster declared by FEMA, provided that the employee's principal residence or place of employment at the time of the disaster was located in an area designated by FEMA for individual assistance. FEMA has declared a COVID-19 disaster in a number of states. See the <a href="#">FEMA disaster page</a>. (Note that President Trump's recently declared COVID-19 national emergency is not a basis for a hardship distribution in other areas of the country). An amendment to add this safe harbor category would not be due before December 31, 2021.</p> <p><b>Withdrawals of Matching and/or Nonelective Contributions from §401(k) Plans.</b> §401(k) plans may allow a distribution of matching and/or nonelective contributions (other than QNECs, QMACs, and §401(k)/(m) safe harbor contributions) after: (i) the contribution has been in the plan for at least 2 years, or (ii) after the individual has been in the plan for at least 5 years. Before adding these distribution options, it is important to confirm that the plan administrator is able to administer this provision.</p> <p><u>Note:</u> The CARES Act includes a special \$100,000 withdrawal provision for "qualified individuals" (as defined earlier in the chart). A withdrawal by a qualified individual that does not exceed \$100,000 is not subject to the 10% penalty tax under §72(t), not subject to mandatory 20% income tax withholding, can be averaged for income tax purposes over 3 years, and can be repaid (but does not have to be) within 3 years.</p>	<p>Most plans allow participants to obtain a distribution of their account balance at any time following termination of employment. If a plan allows partial distributions, then participants could elect to receive a portion of their account balance and leave the remainder in the plan. Otherwise, a participant could receive a portion of the distribution in cash and elect to roll over the remaining portion.</p> <p><u>Note:</u> The CARES Act includes a special \$100,000 withdrawal provision for "qualified individuals" (as defined earlier in the chart). See explanation for Furloughed Employees for more information regarding this distribution.</p>

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	Issue	Furlough	Layoff
Defined Contribution Plans	Partial termination	<p>Partial termination determinations are generally based on the “facts and circumstances,” including the extent to which employees participating in the plan have had a severance from employment. Although a furlough is not a severance from employment, IRS could take the position that it should be treated that way if the furlough is for an extended or indefinite period of time. If so, and the “turnover rate” is at least 20%, the IRS would presume that the plan had a partial termination. In contrast, participants furloughed for a short-term arguably should not count against this limit. See IRS <a href="#">Rev. Rul. 2007-43</a> for more details on calculating the turnover rate and the partial termination thresholds.</p> <p>Under a partial termination, the affected employees must be 100% vested. This means that, if the IRS takes the position described above, the furloughed employees who were either not vested or only partially vested when they were furloughed must be treated as 100% vested.</p> <p>An employer should consult their employee benefits attorney regarding whether their plan has a partial termination, and if so, will need to coordinate with their service providers to ensure vesting is properly credited.</p>	<p>Partial termination determinations are generally based on the “facts and circumstances,” including the extent to which employees participating in the plan have had a severance from employment. If a group of participants is involuntary terminated (i.e., laid off), and the “turnover rate” is at least 20%, the IRS presumes that the plan had a partial termination. See IRS <a href="#">Rev. Rul. 2007-43</a> for more details on calculating the turnover rate and the partial termination thresholds.</p> <p>Under a partial termination, the affected employees must be 100% vested. This means that the laid-off employees who were either not vested or only partially vested when they were laid-off must be treated as 100% vested. Some courts have ruled that laid-off employees who are rehired in a relatively short period of time do not count in calculating the partial termination threshold.</p> <p>An employer should consult their employee benefits attorney regarding whether their plan has a partial termination, and if so, will need to coordinate with their service providers to ensure vesting is properly credited.</p>

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	Issue	Furlough	Layoff
Defined Benefit Plans	Severance from employment for distribution purposes	Furloughed employees generally have not had a severance from employment for distribution purposes.	A layoff will result in a severance from employment for distribution purposes.
	Effect on post-NRA suspension of benefits provision	If the employee is working less than 40 hours per month (or 8 days a month), the employee will be owed a pension benefit for that month. Plan terms should be reviewed. Sometimes the benefit is paid on a current basis (during or shortly after the month in question) and sometimes the plan provides that the value of that benefit will be added to the benefits that ultimately commence (with actuarial increases) at termination of employment.	If the employee is working less than 40 hours per month (or 8 days a month), the employee will be owed a pension benefit for that month. Plan terms should be reviewed. Some plans require benefits to begin immediately upon termination. Others may permit deferral of benefits (with actuarial increases) until the employee reaches his/her required beginning date.
	Partial termination	A defined benefit plan may be considered to have undergone a partial termination based on the analysis above for defined contribution plans.  However, this may not have a practical effect for a defined benefit plan because if the plan does not have sufficient assets (calculated on a plan termination basis; e.g., using ERISA §4044 safe harbor assumptions) to provide benefits to those with already vested benefits, no additional vesting is needed for unvested participants. In addition, for a defined benefit plan that has been frozen or closed for at least 5 years (or 3 for a cash balance plan), all participants will already be fully vested.	Same.
	Effect on accruals	Depends on plan design. If the benefit is an accumulation formula based on compensation paid, then benefits may not continue to accrue if no eligible compensation is paid. The furlough may also affect final average earnings calculations and credited service under final average pay plans. Some plans will continue accruals for a limited period of time during periods of furlough.	Benefit accruals will typically cease on layoff but plan terms should be examined.
	Effect on service crediting	<u>Hours counting</u> – Hours of service will typically not be earned during furlough periods. This will affect employees’ ability to accrue additional benefits and/or earn early retirement eligibility, for example. Plan sponsors may amend the plan to impute service during a furlough, or the plan may already have such a provision.  <u>Elapsed time</u> – If the individual returns to active employment and the period during which no service is provided is less than 12 months, the period of the furlough is counted as eligibility, vesting and benefit service.	Service crediting will typically cease on layoff.

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Defined Benefit Plans	ERISA §4062(e) (cessation of operations)	Only a permanent cessation of operations at a facility can trigger §4062(e) liability.	A “permanent cessation of operations at a facility” that results in a workforce reduction of at least 15% of DB and DC plan participants of the employer is a §4062(e) event. Certain reporting exemptions exist, including for small plans and if, for the plan year preceding the year in which the cessation occurred, the plan’s funded status for PBGC variable rate premium purposes was at least 90%.
	PBGC Reportable Event	A reportable event occurs if the number of active employees participating in a plan declines 20% from the number at the beginning of the plan year. Active employees include employees on paid or unpaid leave other than a layoff, or employees laid off from work for a period of time that has lasted less than 30 days. Thus, furloughs will typically not trigger an active participant reduction reportable event.	A reportable event occurs if the number of active employees participating in a plan declines 20% from the number at the beginning of the plan year. Laid off employees become inactive for this purpose after 30 days. Reductions due to events that are timely reported under ERISA §4062(e) (cessation of operations) are disregarded if timely reported to PBGC under ERISA §4063(a). Several reporting waivers are available.
	Accounting curtailment	The years of future service, or future service over which benefits will be earned, may be reduced by the furlough. If that reduction is significant, curtailment accounting may be triggered. Note that it will not be triggered if the plan is frozen and the plan was, before the event, treated as “all or almost all inactive.”	The years of future service, or future service over which benefits will be earned, will be reduced by the layoff. If that reduction is significant, curtailment accounting may be triggered. Note that it will not be triggered if the plan is frozen and the plan was, before the event, treated as “all or almost all inactive.”

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Non-Qualified Plans	Opportunity to “make up” missed NQ plan contributions	The election made by the employee would remain in effect following a furlough, and there would be no opportunity to make up for lost deferrals for the remainder of the year.	An individual would cease to be eligible to make deferrals following a layoff.
	Change in deferral election and distributions	<p>An employee would not be eligible to change their deferral election and/or receive a distribution solely due to being furloughed, but both would be permissible if the employee qualifies as having an “unforeseeable emergency.” An unforeseeable emergency is a severe financial hardship to the participant resulting from illness or accident (to the participant, his or her spouse, or beneficiary/dependent), loss of property due to casualty, or other similar extraordinary and unforeseeable circumstances. Whether an employee has an unforeseeable emergency is based on the facts and circumstances of each case. Examples of severe financial hardship include (i) the need to pay medical expenses, (ii) the imminent foreclosure of or eviction from a primary residence, (iii) funeral expenses for a spouse, beneficiary or dependent or (iv) other similar extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the service provider. Purchase of a home or payment of college tuition are not considered unforeseeable emergencies.</p> <p>If a participant has an unforeseeable emergency and requests a distribution, the amount of the distribution generally may not exceed the amount reasonably necessary to satisfy the emergency need. However, a distribution may not be made if the emergency may be relieved by other means.</p>	<p>An individual would cease to be eligible to make deferrals following a layoff. Whether the individual is eligible for a distribution would depend on the terms of the plan and (if applicable) any election that the individual had made with respect to the timing of payments.</p> <p>In addition, if the individual was not otherwise eligible for a distribution, the individual may be able to qualify for a distribution due to an unforeseeable emergency. See explanation for Furloughed Employees for more information regarding distributions in the event of an unforeseeable emergency.</p>
	“Separation from Service”	<p>Often, payments under nonqualified retirement plans are made upon separation from employment (or 6 months later) and plans that use such a trigger will need to ensure that payments do not commence until a participant has incurred a “separation” under IRC §409A.</p> <p>A separation from service does not occur until an individual has been on a leave of absence for six months, but this rule only applies if the individual is expected to return following the leave. Once someone has been furloughed for six months, they have a separation from service at such time unless they have a right to reemployment by statute or contract; in that case, the separation from service would occur when the individual's legal or contractual right expires.</p>	<p>Often, payments under nonqualified retirement plans are made upon separation from employment (or 6 months later) and plans that use such a trigger will need to ensure that payments do not commence until a participant has incurred a “separation” under IRC §409A.</p> <p>In general, when an employee is laid off, it will be considered a separation from service. The general rule is that a separation from service occurs if the facts and circumstances indicate that the employer and the employee reasonably anticipate that no further services will be performed after a certain date or that the level of services performed after such date will permanently decline to 20% or less.</p>

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	Issue	Furlough	Layoff
<b>Health and Benefits Plans</b>	Group health plan (GHP) coverage	The implementation of an employee furlough does not necessarily mean that health coverage under an employer's GHP will terminate. The terms of the plan document will govern the extent to which health coverage continues. Employers with fully insured plans will need to consider the terms of their carrier contracts. Any changes should be reflected in plan documents and SPDs (or via SMMs).	When employees are laid off, employer GHP coverage typically is discontinued, including medical, Rx, dental, vision, HCFSA, HRA, HSA contributions, etc. Again, the terms of the plan document will govern the extent to which health coverage continues. Employers with fully insured plans will need to consider the terms of their carrier contracts. Any changes should be reflected in plan documents and SPDs (or via SMMs).
	COBRA (temporary group health care coverage continuation)	A furlough (which is technically a reduction in hours) is not a COBRA qualifying event, unless it results in a loss of group health coverage. If the furlough results in a loss of health coverage, then the employer must issue COBRA notices and allow affected individuals to elect COBRA coverage. For those employees who lose health coverage during a furlough, as an alternative to COBRA, they may look to their state health insurance exchange to purchase new health insurance coverage. Note that a loss of coverage for COBRA purposes means ceasing to be covered under the same terms and conditions that were in effect immediately before the qualifying event. This could include, for example, not only a complete loss of coverage but an increase in required premiums.	A layoff can be viewed as a reduction in hours of work or termination of employment, either of which triggers a COBRA qualifying event for affected employees (and their covered family members) who lose group health care coverage due to the layoff. This qualifying event requires the employer to issue COBRA notices and allow affected individuals to elect COBRA coverage, for up to 18 months (shorter for health care flexible spending accounts), with potential extension for second qualifying events such as disability determination, divorce, loss of dependent status, etc. For those employees who lose health coverage as the result of a layoff, as an alternative to COBRA, they may look to their state health insurance exchange to purchase new health insurance coverage. Group health care coverage includes medical, Rx, dental, vision, EAP, health care flexible spending accounts, and health reimbursement arrangements.
	Cafeteria Plans (general status change events)	A furlough generally does not qualify as a mid-year event that would allow for changes in coverage under the cafeteria plan rules, because benefits typically continue on the same terms and conditions during the furlough period. If a furlough affects an employee's eligibility for coverage, and if the employer's cafeteria plan permits a mid-year election change due to a reduction in hours, the employee may choose to change their cafeteria plan elections in accordance with applicable cafeteria plan rules and the terms of the plan.	If an employee's coverage is terminated due to layoff, their cafeteria plan elections are automatically terminated. If coverage is continued, the furlough rules apply.

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Health and Benefits Plans	Group health plan (GHP) coverage	<p>If the cost charged to an employee for a benefit package option significantly increases or significantly decreases during a period of coverage, the cafeteria plan may permit the employee to make a corresponding change in election under the cafeteria plan. A coverage election may only be dropped if there is a significant cost increase and no similar coverage option is available. The significant cost-change rule doesn't apply to health FSA coverage.</p> <p>If an employer significantly reduces or eliminates the employee GHP contribution in an effort to accommodate employees with reduced hours and compensation and the employer's cafeteria plan document authorizes an employee to make a mid-year election change to a different health plan option in connection with such a significant cost change, the employer can expect a number of employees will submit a request to change their health plan option mid-year to a richer, more expensive health plan option. In order to avoid this, the employer may want to amend its cafeteria plan to prohibit health plan option election changes in connection with that contribution reduction.</p> <p>To the extent that any change in employee GHP contributions is not significant, cafeteria plan rules permit the change to be applied automatically without allowing for an employee health plan option change.</p>	If an employee's coverage is terminated due to layoff, their cafeteria plan elections are automatically terminated. If coverage is continued, the furlough rules apply.
	Cafeteria Plans (change in full-time status)	If an employer's cafeteria plan permits a mid-year election change due to a reduction in hours, an employee may choose to voluntarily drop the employee's GHP coverage if the employee's hours are reduced below 30 hours per week (i.e., full-time status under the ACA) due to a furlough. In order for this qualifying event to apply, the employee must intend to enroll in another health plan option offered by the employee's employer or another employer's group health plan.	If an employee's coverage is terminated due to layoff, their cafeteria plan elections are automatically terminated. If coverage is continued, the furlough rules apply.
	Health Care Flexible Spending Account (HCFSAs)	As noted above, furlough generally does not qualify as a mid-year election change even under the cafeteria plan rules, unless it affects an employee's eligibility for coverage. Typically, employer's limit employees' ability to change their HCFSAs election mid-year due to the requirement that the full elected amount (as reduced by any prior reimbursements) be available for reimbursement even if the employee has not fully funded the account (known as the "risk-shifting rules").	It is likely that HCFSAs coverage will be terminated due to a layoff. Please see COBRA above for guidance. Note that eligible expenses must be incurred while the employee is covered by the HCFSAs. Refer to the terms of the plan regarding the claims submission process, including any applicable deadlines.

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	Issue	Furlough	Layoff
Health and Benefits Plans	Group health plan (GHP) coverage	To the extent that an employer offers a DCFSA, shutdowns in schools and other childcare facilities likely will trigger a mid-year election change event for employees to change/revoke their contributions to DCFSA, regardless of whether a furlough also occurs. Separately, a furlough may trigger a mid-year change event because the employee may then be in a position to provide care for his or her children. Keep in mind that the DCFSA must contain language allowing for these mid-year election changes, in keeping with IRS regulations.	If an employee's coverage is terminated due to layoff, their cafeteria plan elections are automatically terminated. Note that a DCFSA may be drafted to include a spend down feature for former employees which allows them to submit eligible expenses through the end of the plan year. If coverage is continued, the furlough rules apply. Keep in mind that to contribute to a DCFSA, an employee (and spouse, if applicable) must be working or looking for work, or be a full-time student. Refer to the terms of the plan regarding eligibility and the claims submission process, including whether the plan has a spend-down feature for former employees and any applicable deadlines for submitting claims.
	Health Savings Account (HSA)	<p>If an employee is participating in a qualified high deductible health plan (HDHP) at the time of a furlough, cafeteria plan rules allow the employee to change the his/her HSA contribution on at least a monthly basis, effective with the start of the next payroll period and regardless of the reason for the change. That HSA contribution change could include an increase or decrease in the employee's contribution as well as stopping all contributions. In the event that the employee is not receiving employer compensation from which to withdraw the employee's HSA contributions on a pre-tax basis, the employee can make post-tax HSA contributions and deduct those contributions on the his/her income tax return. Whether or not the employee is covered by an HDHP after a furlough, they can continue to use the HSA funds for qualified health care expenses.</p> <p>Employer HSA contributions would continue during the furlough to the same extent as for other active employees. Employers should not continue to make HSA contributions to employees who cease to be covered by an HDHP. Note that any employer HSA contribution that has been "earned," per the terms of the plan, should be contributed to the employee's HSA.</p>	Once an employee is laid off and coverage under an HDHP ends, the employee can no longer contribute to an HSA, unless and until they become covered under an HDHP again. Whether or not the employee is covered by an HDHP after a furlough, they can continue to use the HSA funds for qualified health care expenses. Assuming the employer only contributes to the HSAs of active employees, employer contributions would cease when the employee is laid off. Note that any employer HSA contribution that has been "earned," per the terms of the plan, should be contributed to the employee's HSA.
	Other Benefit Coverages	The terms of other welfare plan coverage (such as life insurance, disability plans, voluntary benefit plans, etc.) during the furlough generally will be governed by the plan documents/contracts, and for insured plans, applicable state insurance law (e.g., which may grant continuation or conversion rights to participants).	Same.

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	Issue	Furlough	Layoff
Health and Benefits Plans	Premium Payments (Group health plan (GHP) coverage)	If employees are not paid during a furlough, an employer will need to consider how to handle the employee portion of the premium or cost of benefit coverages, which is normally paid by payroll deduction, for the duration of the furlough. Employers could elect to (i) reduce or waive the employee portion altogether, (ii) arrange to have employees pay the employee portion by check or other means outside of the payroll process, or (iii) allow employees to make up the employee portion after the furlough has concluded.	Because layoffs typically result in cessation of benefits, no premium payments are likely to be due, except for COBRA premiums, which must be paid by the employee on a monthly after-tax basis. Premium payments to insurers that have continued or converted other coverages typically are payable to that insurer and not to the employer.
	Premium Payments (Voluntary Benefits, such as Critical Illness, Hospital, and Cancer Insurance)	If employees are not paid during a furlough, an employer will need to consider how to handle the employee portion of the premium or cost of benefit coverages, which is normally paid by payroll deduction, for the duration of the furlough. Voluntary benefits are generally exempt from ERISA provided the employer does not sponsor, contribute or otherwise have involvement in the plan, consistent with the current DOL safe harbor. However, if an employer pays employees' contributions to a plan that would otherwise have been exempt from ERISA as a voluntary benefit plan, the plan will lose its exemption and would have to comply with ERISA, including its reporting (Form 5500) and disclosure requirements (i.e., plan document, summary plan description, summary of material modifications, etc.).	If voluntary benefits are continued after layoff, the same rules apply.
	PTO	Some employers may want to require their employees to use their accrued vacation time, sick leave or PTO during the furlough to reduce the company's liability. Or employers may give the choice to their employees to use their vacation time to supplement their pay. Certain state laws may restrict use of accrued time off while on furlough. The safer route is to make the use of accrued time off voluntary. If a company has an unlimited or self-managed PTO policy, check the policy regarding how long an employee can be on leave and still be paid under the PTO policy. If a policy does not explicitly state how long an employee can get paid while on PTO, consider establishing these limits via a policy statement (to be applied prospectively) and communicating this immediately to your employee population.	Employers should carefully determine whether their PTO policy and/or state law requires pay out of accrued vacation time, PTO or sick leave upon layoff.

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	Issue	Furlough	Layoff
Health and Benefits Plans	ACA	<p>Applicable large employers (ALE) must offer health coverage to “full-time employees” to avoid employer mandate penalties. Full-time status is determined based on the number of hours worked in a measurement period, using either the monthly measurement method or the look-back measurement method. ALEs who are using the look-back measurement method should be aware that they will have ACA full-time employees who are in their stability period and under the ACA’s employer mandate rules, if an ALE fails to offer coverage to a full-time employee for the entire stability period (regardless of the number of hours worked), they could be subject to employer mandate penalties. A reduction in hours in connection with a furlough, which is not a termination of employment, may not result in a loss of health coverage. An employer may consider whether to change the eligibility provisions in its GHP. If it does so, it should be mindful that its determination of who is eligible could cease to align with the definition of “full-time employee” under the ACA, and could trigger ACA penalties for the employer. The ACA penalties could be significant, particularly if coverage is not made available to 95% of the full-time employees (as determined under the ACA). Depending on how long the furlough lasts, employers may need to consider how a furlough in 2020 may affect the determination of full-time employee status for health coverage in the 2021 plan year (e.g., will the weeks furloughed be ignored, credited at the employee’s normally scheduled hours, or counted as zero hours worked in the calculation).</p> <p>Additionally, the ALE needs to consider whether the coverage that is offered to full-time employees is affordable. If an employer changes the amount that an employee must contribute to the cost of coverage, it may affect whether coverage is affordable under the ACA.</p>	<p>Layoff is generally a termination of employment, therefore, employers may terminate group health coverage without implicating the ACA issues presented for furloughed employees.</p> <p>Rehires: For an employer using the look-back measurement method to determine full-time employee status, an employer must consider the applicable rules for determining whether any rehired employees must be treated as continuing employees or as new employees. An employee will be considered to have terminated employment—and may be treated as a new employee upon return—if the employee has a period of 13 consecutive weeks (26 weeks for educational organizations) during which the employee is not credited with an hour of service. An employer could also classify a returning employee as a rehire even if their absence was less than 13 (26 for educational institutions) consecutive weeks provided they had previously worked at least 4 weeks and their subsequent absence of service was greater than what they previously worked.</p>

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	Issue	Furlough	Layoff
Health and Benefits Plans	ACA	If the employer furloughs an employee because it does not have enough work or business for the employee, the employee is not entitled to then take paid sick leave or expanded family and medical leave under the FFCRA.	N/A
	Family and Medical Leave Act (FMLA)	<p>An employer must maintain coverage under any group health plan during FMLA leave at the level and under the conditions that coverage would have been provided if the employee had not taken FMLA leave.</p> <p>An employee scheduled to take FMLA leave can be furloughed, however no days associated with the furlough should count against the FMLA entitlement. Also, the request for FMLA leave cannot be used as a reason to decide who gets selected to be furloughed.</p>	N/A
	Unemployment Compensation	Furloughs may trigger eligibility for state unemployment compensation benefits. Employers should encourage employees to access the relevant state unemployment compensation websites for the rules applied in each state. Some states have announced that they are waiving the waiting periods that normally apply before an employee may begin receiving unemployment compensation benefits.	Same

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# COVID-19 Action Plan & Timeline

## Priorities and considerations

- Client has finalized decision or action and implemented solution
- Client currently evaluating solutions or has partially addressed considerations

Area of Focus	Immediate Considerations (1-2 Weeks - by x/x/20)	Short-term (1-2 months) May 2020	Medium-term (3-5 mths) (October 2020)	Long-term (6-15 mths) (2021+)
<b>Coverage &amp; Product Design</b>				
Medical	<ul style="list-style-type: none"> <li>Onsite clinic service confirmation and communication</li> <li>Elimination of telemedicine copay</li> <li>Waiver of out-of-pocket expenses for COVID-19 testing and treatment</li> </ul>	<ul style="list-style-type: none"> <li>WTW rapid assessment of virtual marketplace to support need for additional resources (e.g., virtual physical therapy)</li> <li>Consider extension of \$0 telemedicine copay beyond 4/30/2020</li> </ul>	<ul style="list-style-type: none"> <li>WTW rapid assessment of virtual marketplace for additional resources (e.g., virtual PT)</li> </ul>	<ul style="list-style-type: none"> <li>Impact of deferred primary and preventive care (increase onsite services for multiple locations)</li> </ul>
RX	<ul style="list-style-type: none"> <li>Encourage use of mail-order and home delivery for maintenance drugs</li> <li>Local CVS home delivery at no cost</li> </ul>	<ul style="list-style-type: none"> <li>Assess need to modify RX plan design to encourage mail order</li> <li>Assess access for chronic medications</li> </ul>	<ul style="list-style-type: none"> <li>Evaluate formulary changes (if needed for cost reduction)</li> </ul>	
EAP/ BH	<ul style="list-style-type: none"> <li>Elimination of tele-behavioral health copay</li> <li>Increased services through EAP</li> </ul>	<ul style="list-style-type: none"> <li>Consider extension of tele-behavioral health \$0 copay beyond 4/30/2020</li> <li>Expansion of EAP limits</li> <li>Assess need for additional resources</li> </ul>	<ul style="list-style-type: none"> <li>Assess need for additional resources (e.g., mindfulness)</li> </ul>	<ul style="list-style-type: none"> <li>Assess need for additional resources (e.g., mindfulness)</li> </ul>
Disability / Leaves	<ul style="list-style-type: none"> <li>Confirm existence of STD “personal safety” clause</li> <li>Implications to WKC of COVID-19 contraction in the workplace</li> <li>Increased paid sick leave (+2 weeks)</li> </ul>	<ul style="list-style-type: none"> <li>STD to care for sick family members</li> <li>Develop policy for quarantine/national medical emergency (i.e. job protection, salary replacement, benefit continuation, duration)</li> </ul>	<ul style="list-style-type: none"> <li>Evaluate extended absence impact on disability and productivity</li> </ul>	<ul style="list-style-type: none"> <li>Extended absence impact on disability and productivity</li> </ul>
Other	<ul style="list-style-type: none"> <li>Child care support</li> <li>Mandatory quarantine response</li> </ul>	<ul style="list-style-type: none"> <li>WTW rapid assessment of marketplace to support need for additional resources (e.g., caregiver support)</li> <li>Return to work policies</li> </ul>		

# COVID-19 Action Plan & Timeline (continued)

## Priorities and considerations

- Client has finalized decision or action and implemented solution
- Client currently evaluating solutions or has partially addressed considerations

Area of Focus	Immediate Considerations (1-2 Weeks - by x/x/20)	Short-term (1-2 months) May 2020	Medium-term (3-5 mths) (October 2020)	Long-term (6-15 mths) (2021+)
Legal / Regulatory	<ul style="list-style-type: none"> <li>• HSA compliance</li> <li>• HIPAA &amp; ERISA considerations</li> <li>• Emerging federal response</li> </ul>	<ul style="list-style-type: none"> <li>• Emerging federal response</li> <li>• Initial impacts of economy on XYZ leadership priorities</li> </ul>	<ul style="list-style-type: none"> <li>• Emerging federal response</li> </ul>	
Communications & Change	<ul style="list-style-type: none"> <li>• Strategic COVID communication assessment/Employee resource guide</li> <li>• Microsite/website for centralized communication</li> <li>• Resources/talking points for service center(s)</li> </ul>	<ul style="list-style-type: none"> <li>• Updated employee resource guide</li> <li>• Enhance benefits concierge services</li> </ul>		
Financials	<ul style="list-style-type: none"> <li>• Initial estimates of cost impact of telemedicine and other coverage changes (WTW model)</li> </ul>	<ul style="list-style-type: none"> <li>• Update WTW projected cost impact model</li> <li>• Revisit incentives if needed</li> <li>• Revisit vendor payment terms if needed</li> </ul>	<ul style="list-style-type: none"> <li>• Revisit subsidy strategy, coverage levels and reserve calculations</li> </ul>	<ul style="list-style-type: none"> <li>• WTW longer term cost modeling/ impact of deferred acute care</li> <li>• Impact to insured rates (e.g., life, disability)</li> </ul>
Wellbeing	<ul style="list-style-type: none"> <li>• Complete WTW COVID-19 wellbeing assessment</li> <li>• Concerns by worker type</li> </ul>	<ul style="list-style-type: none"> <li>• WTW rapid assessment of virtual marketplace to support need for additional resources (e.g., mindfulness)</li> <li>• WAH wellbeing support</li> </ul>	<ul style="list-style-type: none"> <li>• WAH wellbeing support</li> </ul>	
Other	<ul style="list-style-type: none"> <li>• Support for physical plant locations</li> <li>• Flex work-arrangements</li> </ul>	<ul style="list-style-type: none"> <li>• Assess need for additional resources (e.g., childcare support)</li> </ul>		<ul style="list-style-type: none"> <li>• Revisit long-term WAH policies</li> </ul>

## About Willis Towers Watson

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