

## BLOGS

### Business Interruption

# The Current State of Business Interruption Legislation

Despite devastating losses due to the forced closure of their businesses and the effect of social distancing mandates, most policyholders around the country that have made claims for business interruption losses under their property policies, are getting a uniform response: Claim denied!

Despite devastating losses due to the forced closure of their businesses and the effect of social distancing mandates, most policyholders around the country that have made claims for business interruption losses under their property policies, are getting a uniform response: Claim denied!

Insurers typically cite two reasons for their refusal to cover: (1) they claim there is no direct physical loss or damage to covered property, and (2) they claim the policy excludes loss or damage due to "virus" or "pathogen."

Setting aside the legality and reasonableness of these positions, the fact remains that these issues will have to be resolved in the courts. However, litigation is both costly and lengthy, but small businesses do not have the luxury of time or cash flow when their doors are closed or their business has slowed to a crawl. In addition, insurance law and the interpretation of insurance policies is a state-by-state inquiry. The rules of construction differ among the states, so what may be covered in one state may not be covered in another. As a result, legislators in seven states have responded with the introduction of legislation that would force insurers issuing policies in their respective states to cover business interruption losses due to the novel coronavirus pandemic. In a nutshell, these laws would require insurers to cover claims by small business for losses related to the coronavirus, and then seek reimbursement in whole or in part from a fund that would be established for this purpose. The fund would itself be funded by assessments on the insurance industry at large, not just those insurers that write business interruption coverage.

The insurance industry has responded to these efforts with a full-frontal lobbying assault, urging the various state Legislatures to stand down because, according to the insurance industry, it is not equipped to handle the claims from both a financial and logistical standpoint. The insurance industry also contends that any legislation forcing coverage despite what they claim are unambiguous contrary terms and conditions would run afoul of the Contracts Clause in the U.S. Constitution which limits states' abilities to interfere with private contract rights.

Nevertheless, at least seven states persist in their efforts to keep their economy afloat with the looming shadow of COVID-19. To follow is a chart of that pending legislation, including its applicability based on the effective date of an insurance policy and the maximum employee threshold for each policyholder business. To date, no state has enacted any legislation, but the bills are making their way through the committee process.

State	Bill Reference	Date Introduced	Applicability Based on Policy Effective Date	Applicability Based on Number of Employees
Louisiana	Senate Bill 477; House Bill 858	March 31, 2020	Retroactive to March 11, 2020 and during Governor's declared state of emergency	HB 858: 100 or fewer employees in Louisiana; SB 477: No limitation on number of employees

Massachusetts	Senate Bill 2888; Senate Bill 2655	March 24, 2020	All policies in force on the effective date of the Act and during Governor's declared state of emergency	150 or fewer employees in Massachusetts
New Jersey	Assembly Bill 3844	March 16, 2020	Retroactive to March 9, 2020 and during Governor's declared state of emergency	100 or fewer employees in New Jersey
New York	Assembly Bill 10226	March 27, 2020	Retroactive to March 7, 2020	250 or fewer employees total
Ohio	House Bill 589	March 24, 2020	Retroactive to March 9, 2020 and during Governor's declared state of emergency	100 or fewer employees total
Pennsylvania	Senate Bill 1114	April 5, 2020	All policies in force as of March 6, 2020	Businesses meeting U.S. Small Business Administration criteria receive 100% of policy limit; other businesses receive 75% of policy limit.
South Carolina	Senate Bill 1188	April 8, 2020	All policies in force on the effective date of the Act and during Governor's declared state of emergency	150 or fewer employees in South Carolina

Finally, the "Business Interruption Insurance Coverage Act of 2020" (H.R. 6494) was introduced in the U.S. House of Representatives on April 14, 2020. However, unlike the state legislation discussed above, it does not purport to require insurers to make good on any pending claims, and is not applicable only to small business. Rather, it requires insurers to "make available" coverage for "any viral pandemic" and "any forced closure of business" as of the effective date of the Act *for an increased premium*. If the increased premium is not paid, an applicable exclusion may be "reinstated." As of today, H.R. 6494 is pending in the House Committee on Financial Services chaired by Rep. Maxine Waters (D-CA).