

The Current State of Business Interruption Legislation

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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.



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).