



# Navigating the Legal, Economic and Business Challenges of the Coronavirus Pandemic

WEBINAR 4

*Nelson Mullins Riley & Scarborough LLP*

COVID-19 Taskforce



# C RONA VIRUS

- [www.nelsonmullins.com/coronavirus-resources](http://www.nelsonmullins.com/coronavirus-resources)
- Questions – Email [Amanda.Miller@nelsonmullins.com](mailto:Amanda.Miller@nelsonmullins.com)
- April 15 – Webinar 5 – FSLA and ADA Considerations for Remote Workers, Cybersecurity Risks with a Remote Workforce
- PPT and Recording of presentation will be emailed to participants and posted online

# Best Practices for Investigating and Assessing Insurance Coverage for Business Interruption Losses

**Christopher J. Blake**

Partner

*Raleigh, NC*

(919) 329-3808

[chris.blake@nelsonmullins.com](mailto:chris.blake@nelsonmullins.com)



# Best Practices for Business Interruption Claims

- No pandemic has impacted the global and US economies on such a scale in so short a period of time as COVID-19. The effects of the virus and business disruptions are being felt across all industry sectors.
- In the face of these economic challenges, companies will be identifying ways to recover or minimize their business losses, and many may be considering whether business interruption insurance coverage is applicable.
- The Nelson Mullins Business Interruption Insurance Coverage Working Group offers the following practical considerations when assessing potential insurance coverage for business interruption losses resulting from COVID-19.



# Inventory Your Insurance Policies

- The question of whether business interruption insurance may be available is very dependent on the specific policy language (which differs from insurer to insurer) and is also dependent on the law of each state.
- If you believe you have a potential business interruption claim, your risk manager should gather all appropriate insurance policies and endorsements.
- If you believe anything is missing, you should contact your insurance broker to obtain complete copies.



# Provide Notice to Insurers

- If you do not provide notice of a claim for the loss of business income, there will be no chance of an insurance claim succeeding.
- After you inventory your coverage, if you and your counsel or broker believe there is any chance at recovery, err on the side of providing notice.
- Timely notice is required by policies, and late notice of a claim is a basis for denial by insurance companies.



# Physical Loss or Damage Requirement

- For “all risk,” hazard, and peril property insurance policies, business interruption coverage typically requires a connection between physical loss or damage to insured property and the loss of income (e.g., a fire at a manufacturing facility that shuts down the facility).
- If you believe your business has suffered some actual physical damage from contamination from COVID-19, you should take action to document such damage as soon as possible. For example, if you have employees who have tested positive for COVID-19, you should contact a qualified environmental testing lab or other testing vendor to record and document the presence of the virus on surfaces and equipment prior to having those surfaces and equipment cleaned and sanitized.
- Your legal counsel can assess whether the law of the state where insured property is located would recognize contamination by virus as physical loss or damage to property.



# Document Any Financial Losses

- The loss of business income must arise from the physical damage to property.
- If you believe you may have a claim, take steps to ensure sufficient records are maintained to document the loss of income and to demonstrate such loss is related to the contamination of the property. The policyholder bears the burden of demonstrating losses.
- Sometimes the cost to remediate property damage can be recovered. So keep track of the expenses incurred when restoring, disinfecting and cleaning up coronavirus damage.



# Period of Restoration

- The time period for which business income losses can be recovered will likely be limited.
- There may be an initial waiting period (*i.e.*, 60 days) but then the time period for which losses can be recovered will typically end once reasonable efforts can be taken to restore the property.
- This amount of time can vary greatly depending on the circumstances (*i.e.*, property is extensive or difficult to reach; lack of availability of qualified personnel to perform restoration efforts).



# Virus Exclusions

- Following earlier epidemics/pandemics including H1N1 and SARS, many insurers added exclusions to business interruption coverage “due to virus or bacteria.”
- A detailed review of your policies should be conducted to determine whether any such exclusion was included in your policies and the scope of what is excluded.



# Contingent Business Interruption Coverage

- Some policies provide coverage for “contingent” business interruption, when your business is interrupted by physical damage or loss suffered by one of your customers or vendors.
- If you suspect this has occurred in connection with one of your customers or vendors, you should advise them to document any physical loss or damage in the same way as if it was suffered by your business.



# Civil Authority Coverage

- Some insurance policies may include provisions that cover losses from civil-authority orders.
- In order for these provisions to apply to COVID-19, there needs to be a civil-authority order that specifically orders the shutting down of a business related to specific property damage.
- General shut down orders intended to stem the spread of the virus are not likely to trigger coverage.



# Additional Coverages Not Linked to Physical Damage

- Although typical property insurance requires physical loss or damage to property to trigger business interruption coverage, some insurance policies include expanded coverage for non-physical types of damage.
- Some of these include: (a) coverage for cancellations specifically relating to epidemics and pandemics; (b) crisis management coverage; (c) coverage for interruption by communicable disease; and (d) event cancellation coverage.
- If you believe you have purchased any of these additional coverages, you should carefully review your policies and endorsements to assess the available coverage.

# OSHA Considerations During COVID-19

## **Weston Adams, III**

Partner

*Columbia, SC*

(803) 255-9708

[weston.adams@nelsonmullins.com](mailto:weston.adams@nelsonmullins.com)

## **Wendy Wilkie Parker**

Of Counsel

*Columbia, SC*

(843) 534-4172

[wendy.parker@nelsonmullins.com](mailto:wendy.parker@nelsonmullins.com)

# OSHA Guidance

- The Occupational Safety and Health Administration (“OSHA”) has provided guidance and information to employers regarding the coronavirus outbreak.
- OSHA has created a website specifically for Safety and Health Topics for COVID-19 - <https://www.osha.gov/SLTC/covid-19/>
- The OSHA website –
  - Provides several guidance documents recently issued by OSHA.
  - Outlines existing standards that may be relevant to providing a safe workplace and responding to virus conditions.



# OSHA Guidance

- The website includes a Guidance on Preparing Workplaces for COVID-19 - <https://www.osha.gov/Publications/OSHA3990.pdf> Guidance on Preparing Workplaces for COVID-19.
- In the Guidance, OSHA recommends that employers:
  - Create an Infections Disease Preparedness and Response Plan if the employer does not have one;
  - Implement basic infection procedures, including promotion of hand washing, housekeeping procedures, and flexible work schedules where possible;
  - Use safe work practices, including providing hand soap, alcohol-based hand rubs, and no-touch trash cans;
  - Develop policies and procedures to promptly identify and isolate sick people where appropriate;
  - Effectively communicate about workplace flexibilities and protections;
  - Implement workplace controls, including engineering and administrative controls; and,
  - Consider the use of personal protective equipment (“PPE”) where applicable.



# OSHA Guidance

In the Guidance, OSHA defines 4 risk categories for employees:

- A. Very High Risk Jobs: such as health care workers performing aerosol generating procedures on known or suspected COVID 19.
  - i. Requires respirators and PPE and engineering controls (air ventilation systems and isolation rooms.)
- B. High Risk Jobs: Health care workers exposed to known or suspected COVID 19.
  - i. Requires respirators and PPE and engineering controls (air ventilation systems and isolation rooms.)
- C. Medium Risk Jobs: workers having frequent and/or close contact (within than 6 feet) with those who might be infected but who are not known or suspected.
  - i. Examples include workers in schools, in other high population density work environments, and “in some high volume retail settings” (grocery store workers, for example).
  - ii. Suggests use of PPE ( and “in some cases respirators”) and installation of plastic sneeze guards. “Workers with medium exposure may need to wear some combination of gloves, a gown, face mask, and/or face shield, or goggles.”
- D. Lower Risk Exposure Jobs: workers who do not have frequent and/or close contact with those who might be infected but who are not known or suspected.
  - i. No PPE or respirators, and no sneeze guards.



# OSHA Standards

- The OSHA website also provides information regarding the OSHA Standards - <https://www.osha.gov/SLTC/covid-19/standards.html>
- There is no specific OSHA standard for COVID-19, but OSHA outlines some existing standards that may be relevant, including:
  - **PPE standards** for the use of **gloves, eye and face protection, and respiratory protection** (29 CFR 1910 Subpart I);
  - The **Respiratory Protection standard** when respirators are necessary to protect workers (29 CFR 1910.134); and,
  - The **General Duty Clause**, which requires employers to provide a workplace that is free “from recognized hazards that are causing or are likely to cause death or serious physical harm.” (29 U.S.C. § 654(a)(1)).



# Recording and Reporting Uncertainty

- OSHA recordkeeping requirements at 29 CFR Part 1904 mandate covered employers record certain work-related injuries and illnesses on their OSHA 300 log.
- OSHA provides that COVID-19 can be a **recordable** illness if a worker is infected as a result of performing their work-related duties, provided all of the following factors are met:
  - A. The case is a confirmed case of COVID-19;
  - B. **The case is work-related**, as defined by 29 CFR 1904.5; and
  - C. The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g. medical treatment beyond first-aid, days away from work).
- The “work-related” recording criterion is difficult for employers to determine in cases of COVID-19.
- Identical “work-related” question as to **reporting** to OSHA. Reporting generally necessary for:
  - A) Within eight hours of a **work-related employee death** (if death occurs within 30 days of the work-related exposure); and
  - B) Within 24 hours of a **work-related in-patient hospitalization, amputation or eye loss** (if this occurs within 24 hours of the work-related exposure).
- Due to this uncertainty around what is “work-related”, manufacturing interests have asked OSHA to take the position that there should be a **presumption** that COVID-19 deaths are not work-related, and they await OSHA’s response.



# Enforcement Guidance related to COVID-19

- Enforcement Guidance for Use of Respiratory Protection Equipment Certified under Standards of Other Countries or Jurisdictions During the Coronavirus Disease 2019 (COVID-19) Pandemic (April 3, 2020)  
<https://www.osha.gov/memos/2020-04-03/enforcement-guidance-use-respiratory-protection-equipment-certified-under>
- **Allows use of both 1) respirators and 2) expired respirators, that were certified in certain foreign countries.**
- Enforcement Guidance for Respiratory Protection and the N95 Shortage Due to the Coronavirus Disease 2019 (COVID-19) Pandemic (April 3, 2020)  
<https://www.osha.gov/memos/2020-04-03/enforcement-guidance-respiratory-protection-and-n95-shortage-due-coronavirus>
- **Allows: 1) the extended use and reuse of respirators, and 2) the use of expired respirators.**
- Temporary Enforcement Guidance - Healthcare Respiratory Protection Annual Fit-Testing for N95 Filtering Facepieces During the COVID-19 Outbreak (March 14, 2020)  
<https://www.osha.gov/memos/2020-03-14/temporary-enforcement-guidance-healthcare-respiratory-protection-annual-fit>

# Environmental Compliance Concerns During COVID-19

**Bernard F. Hawkins, Jr.**

Partner

*Columbia, SC*

(803) 255-9581

[bernie.hawkins@nelsonmullins.com](mailto:bernie.hawkins@nelsonmullins.com)



# Environmental Compliance Concerns During COVID-19

- Regulated entities are struggling to meet specific environmental requirements because of stay-in-place orders, absent employees, inability to receive supplies and/or parts, limited access to consultants, labs, inability to meet, etc.
- March 26, 2020: EPA issued a *Temporary Policy statement for COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program*.
- The Temporary Policy addresses potential for discretionary enforcement relief from EPA for certain types of environmental violations, including those related to:
  - Routine compliance with monitoring and reporting
  - Settlement agreement and consent decree reporting obligations and milestones
  - Failure of air emission control or wastewater or waste treatment systems or other facility equipment that may result in exceedances of enforceable limitations
  - Hazardous waste accumulation in excess of specified amounts and/or time limitations
  - Disruptions at animal feeding operations
  - Other types of possible violations not specifically addressed in the Temporary Policy



# Environmental Compliance Concerns During COVID-19

- However, the Temporary Policy requires a facility to do a number of things to be considered for EPA enforcement discretion, including, but not limited to:
  - Make every effort to comply with their environmental compliance obligations;
  - Act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
  - Identify the specific nature and dates of the noncompliance;
  - Identify how COVID-19 **was the cause of the noncompliance**, and the decisions and actions taken in response, including best efforts to comply and steps taken to come into compliance at the earliest opportunity;
  - Return to compliance as soon as possible; and
  - **Document the information, action, or condition specified in items above.**
- The Temporary Policy is retroactive to **March 13, 2020**.



# Environmental Compliance Concerns During COVID-19

- The Temporary Policy does NOT provide a license to pollute, and it does not alter any provision of any statute or regulation that contains legally binding requirements, and it is not itself a regulation.
- The Temporary Policy does NOT apply to:
  - Criminal violations
  - Activities carried out under Superfund and RCRA Corrective Action enforcement instruments
  - Imports into the U.S.
  - Nor does it relieve “any entity from the responsibility under federal law to prevent, respond to, or report accidental releases of oil, hazardous substances, hazardous chemicals, hazardous waste, and other pollutants....”



# Environmental Compliance Concerns During COVID-19

- States and Tribal agencies may take a different approach and may not recognize the same discretion offered by the EPA Temporary Policy.
- A number of states have issued their own enforcement discretion policies.
  - E.g. some 20 plus states now have policies with varying approaches.
- There may be statutory, regulatory or other document requirements for making out specific other affirmative defenses (in addition to the Temporary Policy discretion requirements), that could include required reporting content, how and to whom disclosures are made as well as timing for disclosures – always consult these to avoid potential waiver of defenses.
  - E.g. voluntary reporting, upset, malfunction, other emergency event provisions, etc.
- There may be statutory or regulatory requirements that cannot be extended at all without consequences.
- Third-parties, including citizen or environmental groups may attempt to bring actions to enforce requirements even if state and federal agencies are providing enforcement deference.



# Environmental Compliance Concerns During COVID-19

- The EPA Temporary Policy places heightened expectations on public water systems.
  - These source are directed to continue normal operations.
- EPA expects **all** regulated entities to operate safely and in a manner that protects the public and the environment.
  - Situations presenting an **acute risk or an imminent threat to human health or the environment** require special actions.
- Where a facility is “essential critical infrastructure,” the EPA may consider a more tailored short-term **“No Action Assurance.”**
  - Determinations are made by the OECA Assistant Administrator on a case-by-case basis; and
  - EPA will consider “essential” facilities that employ essential critical infrastructure workers as determined by guidance issued by the Cybersecurity and Infrastructure Security Agency.

# Questions and Answers



# Contact Information



## **Christopher J. Blake**

**Partner**

*Raleigh, NC*

(919) 329-3808

chris.blake@nelsonmullins.com



## **Weston Adams, III**

**Partner**

*Columbia, SC*

(803) 255-9708

weston.adams@nelsonmullins.com



## **Wendy Wilkie Parker**

**Of Counsel**

*Columbia, SC*

(843) 534-4172

wendy.parker@nelsonmullins.com



## **Bernard F. Hawkins, Jr.**

**Partner**

*Columbia, SC*

(803) 255-9581

bernie.hawkins@nelsonmullins.com