

How Will Insurance Respond to Ebola-Related Events?

In the wake of the Ebola outbreak, many organizations have raised questions about how insurance coverage will respond to Ebola-related events. While proactive risk management and emergency preparedness measures for infectious disease should remain a priority, there is the potential for an Ebola-related loss to impact a client's program in a number of ways. It's important to remember that insurance market reaction is unfolding daily and each client's individual policy or contract is unique. Willis has outlined some of the key insurance coverage considerations for organizations to examine.

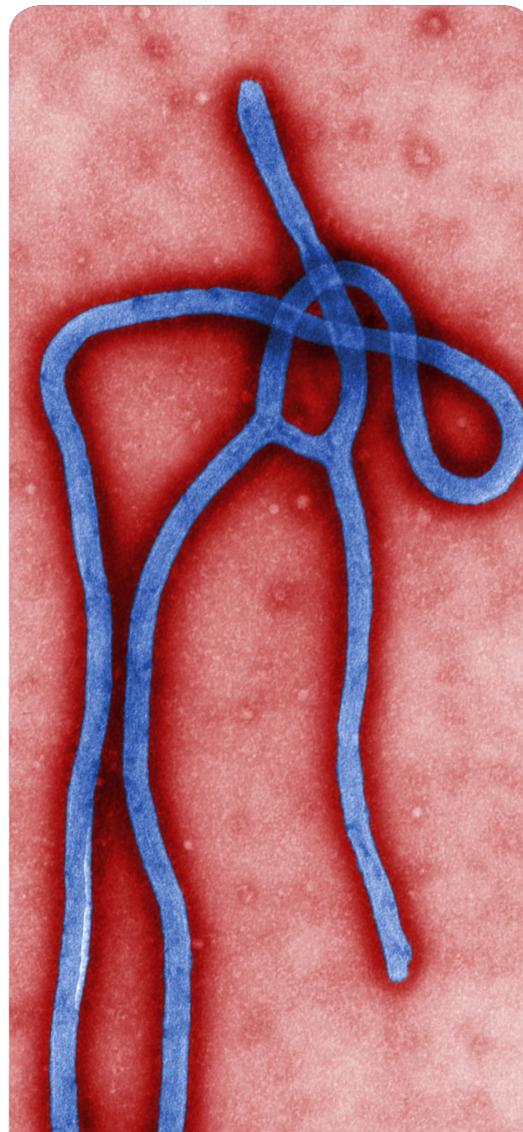
Workers' Compensation

Ebola could present challenges to the workers' compensation process. As the laws vary from state to state, it's difficult to provide an all-inclusive interpretation for any given claim scenario. To understand the complexity of the issue, we'll start with the fact that it is the individual state WC statute that determines whether an employee is due workers' compensation benefits or not. In addition to the differing state WC statutes, some sections of these statutes have been litigated – requiring case law research. So, what may be covered by workers' compensation in one state may not be covered under another state statute. Therefore, each claim is extremely fact specific in determining compensability. However, some assumptions can be made based upon the generalities/commonalities in a number of jurisdictions.

The test (comprised of two stages) used to interpret most claims for compensability is:

1. The injury must arise out of the course and scope of employment.
2. The injury must arise out of or be caused by conditions “unique” or “peculiar” to the work.

In most cases, it is relatively easy to determine if a worker contracted Ebola from their employment. For example, a health care worker being exposed to an infected patient would be able to allege that the injury did arise out of the course and scope of their employment. The second stage of the test requires a different set of facts to consider. The health care worker must prove the injury/illness was unique or peculiar to the work they were performing. Is it reasonable to expect that a health care worker would be exposed to viruses during their employment? An argument could be made that the Ebola virus is no more unique or peculiar than any other virus, disease or illness that a health care worker would be exposed to. This issue may be litigated in some states.



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Advice for Organizations: Employers should not accept any claim until it is determined the employee has an Ebola diagnosis. While waiting on the official diagnosis and to minimize potential exposure to coworkers, consider (i) allowing the employee to use sick time, vacation time, and/or short term disability; (ii) agree on a remote working arrangement; or (iii) put the employee on paid leave if sick time, vacation time or STD is not an option. Once there is a clear diagnosis, employers should consult with their state-specific workers' compensation defense attorney to determine if the claim is compensable. If the claim is accepted, expect potentially significant medical costs. Ebola is a very serious medical condition requiring aggressive and specialized medical care. This medical care will be under strict adherence to and guidance by the government and medical community. If the claim is denied, there may be prolonged litigation which could take years to resolve. In addition, there will most likely be public relations issues associated with insurance carriers and employers accepting or denying this type of claim.

Additional Considerations: There are also potential claims that could be submitted under Coverage B, Employers Liability. For example, a worker's family could file a claim because they contracted Ebola from the employee. A family member who contracts the virus could allege that the employer failed to exercise reasonable protocols to protect the injured worker and the family from being exposed to the virus. Coverage B normally says that the injury the family member suffered must be the direct result of a work-related injury suffered by the employee – a consequential bodily injury. It is important to remember that while workers' compensation (Coverage A) is "no-fault" coverage, employers liability coverage places the burden on the injured party to prove negligence by the employer.

Environmental

There are no standard pollution liability insurance policies. Each carrier has its own form. In addition, pollution liability policies are often heavily manuscripted and uniquely designed for a specific insured's risks. Therefore it is important to carefully review the entirety of each pollution liability policy in order to understand the extent of coverage. Definitions, exclusions and coverage triggers may at first seem to be only subtly different from policy to policy, but they can result in dramatically different coverage interpretations.

Key Contract Considerations

- The majority of pollution liability policies generally either specifically exclude communicable diseases or are silent on such exposures. However, some policies extend the definition of "pollutant" to include fungi/molds and/or bacteria (such as Legionella, MRSA and C. diff). When carriers extend coverage for bacteria, it is typically for clean-up costs only. In the case of fungi/molds, coverage may include clean-up and coverage for third party bodily injury.
- The term "virus" appears in only a very few pollution liability policies or endorsement suites as a defined "pollutant," and most often via special endorsements for specific industries, such as health care. In these cases, coverage is also almost always limited to clean-up only (sometimes also referred to as "disinfection" expense), and no third party bodily injury and property damage coverage is provided.
- When coverage for clean-up costs is afforded for bacteria or viruses, pollution liability policies will often limit such coverage to "facility borne" exposures. In other words, coverage is not provided when the exposure is human to human (or animal) contact, or from contact with materials related to infected humans (or animals). In addition, any coverage for clean-up, regardless of the contaminant of concern, is generally provided only to the extent required by a remedial standard imposed by a regulating agency (USEPA, CDC, etc.) or similar remediation specialist.
- Emergency response costs can sometimes be offered to provide clean-up costs in the absence of a formal claim for a covered pollution condition or loss. However, this coverage may be limited by time element or sublimit restrictions and, ultimately, the same remedial standards will apply.
- Business interruption as a result of a pollution event is an optional coverage on many pollution liability insurance policies. However, when afforded, this coverage is generally conditioned upon a covered clean-up or disinfection event. Pollution business interruption coverage will not extend any business interruption associated with the mere "presence" of Ebola or any associated "stigma" damage.

- Many policies specifically list the discharge or release of a medical or infectious waste as a covered pollutant. As such, losses occurring during the handling of such waste could potentially trigger coverage under the third party bodily injury and property damage, and on- and off-site clean-up elements of the policy.
- Some pollution liability policies include coverage with respect to medical waste materials sent off-site for treatment or disposal. This can include coverage for third party bodily injury and property damage, and clean-up resulting from a pollution release arising out of the transportation to, and operations of, the third party, off-site treatment or disposal facility.
- Coverage for non-criminal fines and penalties may be afforded on pollution liability policies, but only when associated with a covered pollution condition or loss, rather than from a regulatory issue (i.e. fines for improper documentation, mislabeling, etc.).
- Presently, we are not aware of any affirmative grants for, or specific exclusions that specifically name “Ebola” on any pollution liability insurance policy forms.

Property

Traditionally, the answer to the question “Does a Property insurance policy provide coverage for loss or damage caused by Ebola?” is “**No.**” The main reason for this answer is because Property insurance policies require a trigger for coverage, which is physical loss or damage caused by an insured peril and disease or virus is not considered an insured peril.

In the past, there have been similar outbreaks of communicable diseases (e.g. A-H1N1, avian or bird flu, SARS) and traditional Property insurance policies did not respond to those outbreaks either. However, these past pandemics gave rise to specific products or coverages and some have even been specifically endorsed to Property insurance policies.

Examples of these products or coverage include the following:

- Interruption by communicable disease
- Interruption by infectious or contagious disease
- Mandatory closure for pandemic disease (including business income loss, extra expense and crisis response expenses)
- Cost of decontamination and sanitizing the affected premise(s)
- Contingent business interruption/contingent extra expense resulting from a customer or supplier affected by Ebola

Some insurers would actually endorse these various forms of coverage to an existing policy (subject to a separate limit and deductible) or establish a separate insurance product providing this coverage. Absent these forms of coverage endorsed to the policy, it is not the intent of a Property insurance policy to provide coverage for the Ebola virus.

Health Care Professional Liability

Health Care Professional Liability insurance, sometimes referred to as medical malpractice insurance, may provide coverage for liabilities arising from the rendering of, or failure to render professional services. In health care it refers to liability that arises from a failure to use due care and follow the standard of care expected in a particular profession (doctor, nurse, hospital, etc.). Health Care Professional Liability can potentially cover bodily injury, which in some jurisdictions, can also include personal injury, such as mental anguish.

Key Analysis Points

- Definition of named insured
- Definition of claim and notice
- Reporting trigger
- “Unusual” coverages or endorsements to the policy

- Exclusionary language:
 - Focus on “infectious disease language”
 - Focus on “pollution language especially definitions of pollutants, organisms and waste”
 - Carve back language on Mold Exclusion for patients
- Policy limits
- “Batch,” “related events” or “integrated occurrence” language
- Definition of **bodily injury, medical incident, medical services and professional services**

Sample Potential Allegations

- Failure to diagnose and timely treat
- Failure to prevent transmission of the virus
- Failure to follow standard infection control protocols
- Failure to educate and train staff and confirm competency

Risk Management Considerations

- *Pre-event* – Confirm your business continuity, crisis management and exposure control plans are up to date and accessible. Have discussions with your broker to discuss potential risk transfer and mitigation solutions.
- *Event in Progress* – Understand role of public health, government (local, state and national) as well as your own roles as both a provider and an employer. Take notes where plans will need revision.
- *Post-event* – Hold post event sessions and discuss the vulnerabilities and threats that need additional attention. Update and disperse the revised plans. Plan and complete simulated event.
- *Public response* – Establish a clear policy for clearing public statements, interviews, etc. by administration, employees and medical staff.

General Liability

Products Liability or Operations

- If the Ebola was contracted by a third party from contact at your premises it would likely be a premises claim. If the disease is contracted by a third party after contact with a product after the customer leaves the premises then it is most likely to be a products liability claim. This could raise issues as to limits, aggregates and retention that apply. Retail establishments and distributors should be concerned about whether coverage is available through insurance provided under vendor endorsements and whether hold harmless in contracts cover the exposure.

Coverage Territory

- If the claim or suit is brought in the U.S. and product was made or sold in the U.S. or employee was traveling from U.S. then conditions of CGL coverage territory definition might be met. However, insured might have to look to an umbrella or foreign program for coverage if suit is brought outside the U.S. or if the product was not made or sold in the U.S.

One Occurrence or Multiple Occurrences

- If there is coverage, a question could arise as to whether multiple occurrences are one occurrence subject to a single occurrence limit and a single retention or individual occurrences to which separate retentions (and possibly limits if extending over multiple policy periods) apply. A consideration would also be whether or not the policy contains a batch clause or not and, if it does contain batch language, how a batch is defined.

Other Considerations

Bacteria/Fungi/Microbe Exclusion and/or Communicable Disease Exclusion

- While these are not typically included in primary CGL forms (sometimes included in Umbrella/XS forms), if added to the policy by endorsement these might exclude coverage for losses arising from Ebola.

Bodily Injury Definition

- Physical injury arising from an occurrence is covered subject to exclusions that might apply, but mental injury has to be the result of actual physical injury. So a claim for damages resulting from a fear of contracting Ebola would probably not be covered unless the person actually developed a physical injury (Ebola or some other disease that they thought was Ebola) that led to the fear. We urge underwriters to amend the BI definition so that the mental injury doesn't have to result from physical injury, but it's very difficult to get the underwriters to agree in most cases.

Pollution

- Some carriers define Pollution as: *"Pollution" includes the actual, alleged or potential presence in or introduction into the environment of any substance if such substance has, or is alleged to have, the effect of making the environment impure, harmful, or dangerous. Environment includes any air, land, structure or the air therein, watercourse or water, including underground water.*
- Under this definition, could Ebola be considered a pollutant? It's a substance. It makes the environment impure but the courts may not interpret the store or the surroundings of the person(s) infected as the "environment".
- The standard ISO CGL uses a different definition which may be preferable: *"...solid, liquid, gaseous or thermal irritant or contaminant including smoke, vapor, soot, fumes, alkalis, chemicals and waste..."*

Human Resources and Employee Benefits

Currently, most workers in the U.S. are unlikely to encounter the Ebola virus or individuals with Ebola hemorrhagic fever (EHF). However, exposure to the virus or someone with EHF may be more likely in certain sectors, including the healthcare, mortuary, and airline servicing industries.

Response: Human Resource professionals are responding to the current crisis by being proactive around: 1) understanding the risks to their workforce and workplace; 2) identifying protocols and restrictions based on reliable sources (i.e., CDC, OSHA, industry organizations such as the American Hospital Association), and; 3) communicating crisis response measures clearly to all workers. Some employers are considering: restricting international travel (especially to higher risk areas); medical inquiries and potential quarantines for employees who have traveled (especially to higher risk areas); revising leave from work or work from home policies; and educating management and employees. HR professionals should monitor their industry's practices regarding absence policies in response to the ebola risks.

FMLA: An employee who is eligible for FMLA leave will be entitled to such leave if the employee contracts Ebola, based on having a serious health condition that requires leave from work. Similarly, an eligible employee whose covered family member contracts Ebola is likely to be entitled to leave to care for such family member (even if such "care" involves only psychological care and not physical care). It is advisable to err on the side of leniency when FMLA determinations are made regarding: exposed, potentially exposed and quarantined individuals.

Employee Benefits Coverages: Health, short and long term disability and life carriers will be monitoring the compensability of ebola-related claim expenses for employee members. Issues of work-relatedness may arise and will require regular monitoring. These coverages will cover members and claimants for treatment of Ebola to the same the extent they cover treatment of other diseases. Out-of-pocket costs, such as deductibles, copayments and other forms of cost-sharing, apply as they would for any condition. Existing provider network restrictions remain the same. Individuals traveling overseas need to understand their plan's medical coverage provisions for care outside of the United States.

Directors and Officers Liability

Bodily Injury Claims: When thinking about Directors & Officers (D&O) Liability Insurance, you typically don't associate the coverage with bodily injury claims. However, a bodily injury claim, such as the mishandling of a product or people resulting in the outbreak of a communicable disease or death, can result in a downstream Directors & Officers Liability claim. For instance, if the Directors and Officers fail to act or to provide adequate oversight or if the company lacks the proper controls, a D&O claim can arise. Also, if a company has an "Ebola" loss that negatively impacts the stock price of the company, a shareholder direct and derivative claim may be made.

The majority of D&O policies contain an exclusion for Bodily Injury claims. However, the exclusion may vary in different policy forms. As a director or officer of an organization who may face risk to Bodily Injury Claims, it is important to examine your Directors & Officers Liability policy, including any Broad Form Side A policies, to determine how the Bodily Injury Exclusion applies. Key considerations are as follows:

- Change any "absolute" Bodily Injury and Property Damage Exclusion to a "for" worded exclusion. An "absolute" exclusion typically contains "alleging, arising out of, resulting from" wording which is extremely broad. For instance, if a company faces an Ebola loss that results in a shareholder claim or a claim for poor oversight, policies or procedures, the insurer will most likely deny a claim with an absolute exclusion because it arose from bodily injury. If the exclusion has "for" wording, it should apply to claims "for" Ebola only and not the resulting loss.
- Further, if possible, as a belt and suspenders, have your D&O policy amended to provide exceptions to the "for" exclusion for shareholder claims, Side A claims and claims for poor oversight, policies and procedures.

Conduct Exclusion: Another area of concern in a D&O policy is the Conduct Exclusion. Many policies exclude deliberate fraudulent or criminal acts and are subject to final adjudication wording before the exclusion applies. Some policies also contain an exclusion for any willful violation of law, rules or regulations. The latter wording can be especially concerning in the case of an Ebola loss. For instance, if the company becomes aware of a risk within its operations and fails to follow the proper protocols, can the acts of the directors and officers be challenged at some point? Again, a close examination of your D&O policy to determine the scope of the Conduct Exclusion and if the policy contains the right trigger before the exclusion applies, such as final, non-appealable adjudication in the underlying claim wording, is imperative if the company has exposure to this type of loss.

Criminal Liability: If your company is in the health care business or another business reliant on funding from the Federal Government, the consequence of a mishandled Ebola loss could result in criminal liability, the exclusion of officers in a position of responsibility from participating in federal health care programs and possible incarceration. In conjunction with your attorneys, it is important to examine the provisions of the Responsible Corporate Officer Doctrine and to make sure the company has the proper compliance program in place.

Contact Information

Please contact your Willis Client Advocate® for more information. Additional resources can be found at Willis Disease Response Center: <http://www.willis.com/crisis/disease/>

If you would like information on other international issues, or to view past *Alerts*, please visit our [website](#). *The observations, comments and suggestions we have made in this publication are advisory and are not intended nor should they be taken as legal or financial advice. Please contact your own legal or financial adviser for an analysis of your specific facts and circumstances.*

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