

Navigating Adapted Operations Advisory Series: Part Two – Insurance Coverages Concerns and PPP Loan Requirements

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Who Needs to Know

Employers who are reopening (or have already reopened) by bringing employees back to their workplaces.

Why It Matters

Bringing a workforce back to the workplace, whether from teleworking, furlough or layoff status, is an exercise with many moving parts. Employers need to follow a reasoned strategy to address COVID-19-related risks and other considerations associated with recalling some or all of a workforce to develop a sensible back-to-work protocol.

Troutman Pepper is issuing a series of client advisories, [Navigating Adapted Operations](#), to help businesses design workplace operations adapted to the challenges of sustaining business efforts during and after the COVID-19 pandemic. This series will address how businesses can reopen, recover or control workplaces in the face of operational changes that could last even longer than first planned. In [Part One of the advisory series](#), we examined:

- Phased approach considerations for workplaces;
- Creating and implementing a COVID-19 response plan; and
- Employee benefits concerns for a returning workforce

We invite your questions and feedback on every topic and also ones you may want addressed, but are not covered thus far. Our aim is to provide a comprehensive review of matters that will enable employers to make informed decisions about the overlap and interplay of health/safety, risk management, financial challenges and workplace oversight. At the conclusion of the series, we will share a dynamic outline of the categories examined that clients may adopt to navigate their own adapted operations.

Insurance Coverages

Employers who experience COVID-19-related losses themselves or who receive COVID-19-related claims by others should evaluate their insurance policies to determine whether they provide potential coverage for the claims or losses. There are many types of insurance coverage, and even within the same type of coverage, policy terms vary. All coverage issues are decided, in the first instance, by the express terms of an employer's policy and the unique facts of the claim or loss for which coverage is sought. Employers have asserted coverage claims under a number of policy types, and court decisions have now started to emerge about whether the policies provide

coverage. A comprehensive analysis of these issues is beyond the scope of this advisory. As a general matter, insurers have denied coverage or reserved the right to do so for claims filed by businesses for their own COVID-19-related losses, such as for business interruption. Employers seeking to evaluate their own specific policies for potential coverage for COVID-19-related claims and losses should seek guidance from their insurance professional and/or counsel.

Two types of coverage are specific to claims against employers by employees and by others related to actions or losses by employees: workers' compensation insurance and employer liability insurance. We will briefly discuss issues often faced by employers under these policies.

Workers' Compensation:

Workers' compensation insurance covers employees who suffer injury or illness "arising out of or in the course of their employment." Workers' compensation is governed by state statutes and rules that vary state-to-state, and outcomes are highly fact-sensitive. Generally, employees who contend that they contracted COVID-19 at work may assert workers compensation claims. In most jurisdictions, individuals seeking benefits under workers' compensation will also need to meet the burden of demonstrating that they contracted COVID-19 at work or that their COVID-19 illness arose out of, or was caused by, conditions at work.

Many factors are considered in determining whether a particular employee's COVID-19 is potentially work-related. Some of the factors courts have considered include:

- The timing of when the loss occurs: Were there reports of previously infected individuals made in this same time period?
- The location(s) where the injured worker was present leading up to the injury or exposure: Was the injured worker within an area where the virus was present or carried a greater risk?
- The activities the injured worker was engaged in leading up to the loss or exposure: Was the individual in contact with others or working remotely?
- The specific nature of the loss: What further details can be uncovered to provide greater clarity around exposure to the virus as an occupational disease?

In most jurisdictions, an employee is generally "barred" from suing an employer directly for injuries that are covered by workers' compensation insurance. The employer's workers' compensation insurance provides the employee's sole remedy against the employer for the work-related injury, subject to certain exceptions. Most states recognize an exception to the workers' compensation "bar" for workplace injuries caused by the employer's intentional wrongs. As a result, some employees who contract COVID-19 at work may seek to sue employers directly arguing that the employer committed an intentional wrong by exposing the employee to COVID-19. The scope of this exception varies significantly by jurisdiction. Employers concerned about potential direct intentional wrong claims should seek advice from workers' compensation counsel in their states to fully evaluate the risk of these claims.

Employers' Liability Coverage:

This type of coverage, also referred to as part two of the workers' compensation policy, provides protection for the insured employers' liability for an employee's work-related bodily injury or disease, other than liability imposed by

a state's workers' compensation law.

Claims under the **employers' liability coverage** generally center around four types:

1. *Third-party actions*: A worker exposed to COVID-19 files a claim against the building owner, who in turn makes a third-party claim against the worker's employer, based upon a direct tort claim or contractual obligation.
2. *Dual capacity claims*: Using our previous example, an injured worker contends their PPE, which is also manufactured by their employer, is defective, resulting in an exposure to COVID-19. The employee can bring a claim against their employer as both the employer and the manufacturer.
3. *Loss of consortium*: The injured worker's spouse makes a claim for loss of services.
4. *Consequential bodily injury*: A family member alleges that he/she was also exposed to COVID-19 from the employee's illness and work-related exposure.

PPP Loan Requirements

Employers impacted financially by COVID-19 may consider applying for loan forgiveness under the Paycheck Protection Program (PPP). For more information concerning the forgiveness of PPP loans, please click [here](#). The following describes the documentation needed for the PPP loan forgiveness application.

Documentation Necessary for Forgiveness of a PPP Loan:

A borrower on a PPP loan may apply for loan forgiveness for certain eligible costs incurred or paid with PPP loan proceeds during the 24-week period beginning on the date the loan was disbursed (borrowers receiving PPP loans before June 5, 2020 may elect to use the 8-week period beginning on the date the loan was disbursed) (Covered Period). Costs eligible for forgiveness include:

- Payroll costs;
- Interest payments on mortgages incurred in the ordinary course before February 15, 2020; and
- Payments for distribution of electricity, gas, water, transportation, telephone or internet access for which service began before February 15, 2020.

The following documents must be submitted with the Loan Forgiveness Application (Small Business Administration (SBA) [Form 3508](#) or 3508EZ):

1. *Completed PPP Loan Forgiveness Calculation Form* (attached to the Loan Forgiveness Application).
2. **Completed PPP Schedule A* (attached to the Loan Forgiveness Application).
3. *Payroll*: Documentation verifying the eligible cash compensation and non-cash benefit payments from the Covered Period, consisting of each of the following:
 - Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees.
 - Tax forms for the periods overlapping the Covered Period:
 1. Payroll tax filings (typically, Form 941); and
 2. State quarterly business and individual employee wage reporting and unemployment insurance tax filings to the relevant state.
 - Payment receipts, cancelled checks, or account statements documenting the amount of any employer contributions to employee health insurance and retirement plans that the borrower includes in the forgiveness amount calculation.
 - The average number of full-time equivalent (FTE) employees on payroll employed by the borrower on

January 1, 2020 and at the end of the Covered Period.

4. **FTE*: Documentation showing (at the election of the borrower) the average number of FTE employees on payroll per week employed by the borrower during certain selected eligible time periods, as provided in SBA Form 3508.
5. *Nonpayroll*: Documentation verifying existence of the obligations/services before February 15, 2020, and eligible payments from the Covered Period.
 - o Business mortgage interest payments: Copy of lender amortization schedule and receipts or cancelled checks verifying eligible payments from the Covered Period; or lender account statements from February 2020 and the months of the Covered Period through one month after the end of the Covered Period verifying interest amounts and eligible payments.
 - o Business rent or lease payments: Copy of current lease agreement and receipts or cancelled checks verifying eligible payments from the Covered Period; or lessor account statements from February 2020 and from the Covered Period through one month after the end of the Covered Period verifying eligible payments.
 - o Business utility payments: Copy of invoices from February 2020 and those paid during the Covered Period and receipts, cancelled checks, or account statements verifying those eligible payments.

* Only required for SBA Form 3508

Documents that Each Borrower Must Maintain but is Not Required to Submit:

1. *Documentation supporting the listing of each individual employee in PPP Schedule A Worksheet Table 1 and Table 2.
2. **Documentation supporting the certification that annual salaries or hourly wages were not reduced by more than 25 percent during the Covered Period relative to the period between January 1, 2020 and March 31, 2020.
3. Documentation regarding any employee job offers and refusals, reductions in hours, firings, resignations, and any inability to hire.
4. **Documentation supporting the certification, if applicable, that the borrower did not reduce the number of employees or the average paid hours of employees between January 1, 2020 and the end of the Covered Period.
5. Documentation supporting the certification, if applicable, that the borrower was unable to operate between February 15, 2020 and the end of the Covered Period at the same level of business activity as before February 15, 2020, due to compliance with applicable regulations or guidance.
6. *Documentation supporting the PPP Schedule A Worksheet “FTE Reduction Safe Harbor 2.”
7. All records relating to the borrower’s PPP loan, including documentation submitted with its PPP loan application, documentation supporting the borrower’s certifications as to the necessity of the loan request and its eligibility for a PPP loan, documentation necessary to support the Borrower’s loan forgiveness application, and documentation demonstrating the borrower’s material compliance with PPP requirements.

The borrower must retain all such documentation in its files for six years after the date the loan is forgiven or repaid in full, and permit authorized representatives of the SBA, including representatives of its Office of Inspector General, to access such files upon request.

* Only required for SBA Form 3508

** Only required for SBA Form 3508EZ

The information outlined above is derived from the Loan Forgiveness Application, SBA Forms 3508 or 3508EZ, the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) and the rules promulgated under it, and

it should not be relied on without reference to the foregoing and in consultation with an advisor.

During these uncertain times caused by the COVID-19 pandemic, employers should consider how various types of insurance coverages may apply and how a PPP loan to limit financial hardship may offer loan forgiveness. Please consult with a Troutman Pepper [Employment Law](#) or [Corporate Finance](#) attorney for any COVID-19-related issues. Please visit the [Troutman Pepper COVID-19 Resource Center](#) for COVID-19-related news and developments.

In **Part Three** of the **Navigating Adapted Operations Advisory Series**, we will examine **back to work considerations** and **bringing employees back to the workplace**.

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