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COVID-19 EXECUTIVE SUMMARY AND BEST PRACTICES FOR LOUISIANA BUSINESSES[1]

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I. INTRODUCTION

Having already worked with several clients impacted by the global coronavirus outbreak, we prepared the below overview to be shared with our clients and close contacts to provide a general understanding of the current state of the COVID-19 outbreak and a high-level overview of the anticipated impacts and legal responsibilities of Louisiana businesses.

II. WHAT IS COVID-19?

In December 2019, health care professionals discovered cases of a coronavirus strain in Wuhan, China believed to spread through person-to-person contact (within about 6 feet) or respiratory droplets from sneezing or coughing by an infected person. The disease caused by this virus (SARS-CoV-2) has been labeled coronavirus disease 2019 (COVID-19 is used interchangeably herein for the virus and the disease). It is also possible that COVID-19 can spread from contact with infected surfaces or objects, but this is not thought to be the main disease vector for COVID-19. The virus symptoms are a mild to severe respiratory illness with fever, cough, and difficulty breathing. These symptoms may take 2-14 days to appear after exposure, but COVID-19 remains difficult to test for due to low test kit accessibility.

As of March 18, 2020, COVID-19 has spread to every continent (except Antarctica) and is present in at least 160 countries, with 191,127 confirmed cases globally. The virus is already responsible for over 7,800 deaths, most of which have occurred in China, Italy, and Iran.[2] According to the World Health Organization, the risk assessment for further spread of COVID-19 across the globe remains very high. The United States has confirmed 10,442 CDC laboratory-confirmed and/or reported presumptive cases as of this writing,[3] including 150 deaths, across 54 jurisdictions (50 states, D.C., Puerto Rico, Guam, and US Virgin Islands). As of this writing, Texas has at least 221 confirmed cases, and 3 deaths, but it is anticipated that this will increase. Louisiana has at least 347 confirmed cases and 8 deaths with 17 out of 64 parishes impacted though most known cases remain in Orleans Parish and Jefferson Parish.[4] Again, as testing becomes more available,[5] the number of confirmed cases is expected to quickly increase.

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[2] *See* https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200318-sitrep-58-covid-19.pdf?sfvrsn=20876712_2 (updated as of March 18, 2020). Johns Hopkins, as of March 19, 2020 at 12:30 p.m. CDT, provided 229,390 global confirmed cases and 9,325 deaths.

[3] *See* https://www.cdc.gov/coronavirus/2019-ncov/cases-in-us.html (updated as of *March* 19, 2020 at 12:30 p.m. CDT).

[4] *See* http://ldh.la.gov/Coronavirus/ (updated as of March 19, 2020 at 12:30 p.m. CDT).

[5] *Id.* As of this writing, Louisiana had completed 805 state lab coronavirus tests.

Although the U.S. has no domestic governmental travel restrictions at this time, the federal government has banned non-citizens from entering the country from China, Iran, most states within the European Union (27 countries including Ireland), the United Kingdom (provided such persons were within those countries in the last 14 days before attempted entry to the U.S.), and the Republic of Ireland.[6] The U.S. government has also issued Level 3 travel advisories warning against "unnecessary travel" to/from South Korea and Malaysia, among others.[7]

The CDC's current risk assessment for the U.S. states that at least 24 U.S. states are experiencing sustained community transmission for now (including Louisiana albeit in "Defined Areas"), four states are experiencing widespread sustained community transmission (Georgia, Iowa, Maryland, and Massachusetts), and four states are experiencing community transmission in defined areas or widespread (California, Michigan, New York, and Washington), but the immediate risk of exposure is still low for most Americans.[8] In communities where there is ongoing community spread with COVID-19, people are at elevated risk of exposure with the level of risk dependent on the location.[9]

III. ECONOMIC IMPACT OF COVID-19

As our clients are all aware, COVID-19 is affecting businesses across the world. Supply chains originating in Asia, and China especially, have showed strain due to COVID-19, and the Chinese government has issued force majeure notices to qualifying businesses operating in China to help mitigate the effect of the virus. COVID-19 has similarly affected U.S. domestic manufacturing, transportation, hospitality, and other commercial industries, as companies have begun to rely on *force majeure* contractual provisions as a legal defense for failures or anticipated failures to perform under various agreements.

IV. *FORCE MAJEURE* IN LOUISIANA

In Louisiana and many common law jurisdictions, *force majeure* is a doctrine that recognizes that a party should not be responsible for a breach of contract caused by an unforeseeable event. Louisiana jurisprudence "uses the terms 'fortuitous event' and force majeure (irresistible force) interchangeably." *Payne v. Hurwitz*, 2007-0081 (La. App. 1st Cir. 1/16/08), 978 So.2d 1000, 1005. "Force majeure is defined as 'an event or effect that

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[6] *See* https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-other-countries.html (updated as of March 19, 2020 at 12:30 p.m. CDT).

[7] *See* https://www.cdc.gov/coronavirus/2019-ncov/travelers/map-and-travel-notices.html (updated as of March 19, 2020 at 12:30 p.m. CDT).

[8] *See* https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (updated as of March 19, 2020 at 12:00 p.m. CDT); https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html (updated as of March 19, 2020 at 1:30 p.m. CDT).

[9] *Id.*

can be neither anticipated nor controlled.'" *Id.* at 1005 (citing Black's Law Dictionary 673-674 (8th ed. 2004)). Fortuitous events and *force majeure* include "such acts of nature as floods and hurricanes" and "[i]t is essentially synonymous with the common law concept of 'act of God.'" *Id.* at 1005 (citing *Saden v. Kirby*, 94-0854 (La. 9/5/95), 660 So.2d 423, 428; *Bass v. Aetna Ins. Co.*, 370 So.2d 511, 513 n. 1 (La. 1979); and *A. Brousseau & Co. v. Ship Hudson*, 11 La. Ann. 427 (La. 1856)).

Under Louisiana law, "[t]o relieve an obligor of liability, a fortuitous event must make the performance ***truly impossible***." (emphasis added) *Payne,* 978 So. 2d at 1005 (citing La. C.C. art. 1873, Revision Comments—1984, (d)). "The nonperformance of a contract is not excused by a fortuitous event where it may be carried into effect, although not in the manner contemplated by the obligor at the time the contract was entered into." *Id.* (citing *Dallas Cooperage & Woodenware Co. v. Creston Hoop Co.,* 161 La. 1077, 1078–79, 109 So. 844 (La. 1926)). In other words, if the fortuitous event prevents the obligor from performing his obligation in the manner contemplated at the time of contracting, ***he must pursue reasonable alternatives to render performance in a different manner before he can take advantage of the defense of impossibility***. *West v. Cent La. Limousine Serv., Inc.*, 03–373, p. 2 (La. App. 3rd Cir. 10/1/03), 856 So.2d 203, 205. This is a very strict standard and carries a heavy burden for the party invoking *force majeure* as an excuse for non-performance. Indeed, a party is not released from his duty to perform under a contract ***by the mere fact that such performance has been made more difficult or more burdensome by a fortuitous event***. *Schenck v. Capri Constr. Co.,* 194 So.2d 378, 380 (La. App. 4th Cir. 1967). "[A] party is obliged to perform a contract entered into by him if performance ***be possible at all***, and regardless of any difficulty he might experience in performing it." (emphasis added) *Associated Acquisitions, L.L.C. v. Carbone Properties of Audubon, L.L.C.*, 07–0120 (La. App. 4th Cir. 7/11/07), 962 So.2d 1102, 1107-08.

Generally, parties will also include *force majeure* provisions in contracts to provide more certainty on what constitutes a *force majeure* in their specific agreement and the procedures for invoking it. Otherwise, the decision whether an event was foreseeable would be left entirely to the courts. As these provisions are often non-exclusive, however, parties still dispute whether certain events are or are not *force majeure*, so ultimately, whether COVID-19 constitutes a *force majeure* triggering event will be determined based on the contract language in the context of COVID-19's effects on the non-performing party, *e.g.*, whether there are any government act or travel restrictions preventing performance either in Louisiana or the attendees' places of origin, among other potentially applicable language.

V. EMPLOYER BEST PRACTICES

Certain federal and state regulations affect how employers should react to outbreaks like COVID-19, the most important of which are the Family Medical Leave Act

("FMLA"), the Americans with Disabilities Act ("ADA"), and the Occupational Safety and Health Act ("OSHA").

A. *The Family Medical Leave Act*

Under the FMLA, eligible employees may take leave from a covered employer for up to 12-weeks for specified family and medical reasons, including diseases like the flu or COVID-19. Leave related to the coronavirus would likely be unforeseeable, so employees must notify the employer of leave "as soon as possible and practical." Whether notice complies with this standard is a fact-specific inquiry. Once an employer has enough information indicating a need for COVID-19-related leave, it ***must*** begin the FMLA leave process.

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act, a major piece of legislation amending the FMLA on a temporary basis (the "Act"). To avoid disrupting the rest of the FMLA, the Act provides an additional leave provision to Section 102(a)(1) of the FMLA specifically for the public health emergency created by COVID-19. Under this amended FMLA, an employee[10] who is unable to work can take leave if their minor child's school or place of care has been closed or if their childcare provider is unavailable due to a public health emergency. This is the only avenue for paid leave under the added FMLA provision.

Separately, the Act provides a paid sick leave obligation to applicable employers, who must now make available 80 hours of paid sick leave for full-time employees. Part-time employees are entitled to the number of hours equal to the number of hours that employee worked on average over a 2-week period. Employees are entitled to this sick leave if any of the following conditions are met:

(1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID–19.

(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID–19.

(3) The employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis.

(4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2) [*sic*].

(5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID–19 precautions.

[10] An employee is eligible if they have worked for the employer for at least 30 calendar days, far shorter than the original FMLA.

(6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

The Act provides varying payment caps depending on whether the employee is seeking leave under the FMLA or the paid sick leave provisions. If under the FMLA, the employer can provide the first 10 days of leave unpaid and then additional leave must be paid at 2/3rds the employee's regular rate of pay, subject to a cap of $200 per day and $10,000 in the aggregate. Employees can substitute their accrued leave (vacation, personal, or medical/sick) for this unpaid period.

Paid sick leave is also capped but at a higher rate. Employees taking advantage of the paid sick leave obligation are entitled to their regular rate of pay but no higher than $511 per day and $5,110 in the aggregate for uses 1-3 listed above or $200 per day and $2,000 in the aggregate for uses 4-6 listed above.

Critically, the Act applies to private employers with 500 or fewer employees and certain public employers.[11] The Act does *not* provide a statutory exemption for employers of fewer than 50 employees as the original FMLA did.[12] Instead, the Act creates two potential reprieves for the struggling small business. First, employers with fewer than 25 employees do not have to restore the employee to the same or equivalent position if the employees position no longer exists due to economic conditions or other changes in the employer's operations which affect employment and are caused by the public health crisis during the period of leave. Employers who seek to take advantage of this exception must reasonably try to restore the employee and follow the notice requirements under the Act. Second, the Act authorizes the Department of Labor to issue regulations allowing for exemptions for employers of fewer than 50 employees when the Act's provisions would jeopardize the viability of the business as a going concern, but there is no requirement that the Department actually promulgate these regulations or even a period of time for doing so. Lastly, to help employers comply with the Act, those employers who pay benefits under the Act are entitled to a tax credit up to the amount of benefits they are obligated to pay under the Act.

The law takes effect 15 days after enactment, *i.e.*, April 2, 2020. The new law includes a sunset provision establishing that this change to the FMLA will automatically expire on December 31, 2020, but Congress could always pass additional legislation extending the benefits of the new FMLA.

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[11] For both FMLA and paid sick leave, employers of healthcare providers or first responders can elect to exclude such employees from the application of the FMLA and paid sick leave provisions.

[12] Like the original FMLA, the Act does not provide an exemption for non-profit organizations.

B. The Americans with Disabilities Act

Under the ADA, an employer cannot inquire as to disabilities and cannot require medical examinations unless (1) the inquiry or exam is job-related and consistent with business necessity or (2) the employer has a reasonable belief that the employee poses a direct threat to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation. The EEOC relies on the CDC and other public health authorities to determine whether an outbreak is a direct threat. At this time, WHO and CDC have classified COVID-19 as a pandemic but has not determined that there is an immediate risk of exposure to all Americans and has not found widespread community transmission. The EEOC has stated that diseases like seasonal influenza or swine flu (which affected 61 million Americans in 2009) would not pose a direct threat or justify disability-related inquiries or medical examinations. However, if "the CDC or state or local health authorities determine that COVID-19 is significantly more severe, "it could pose a direct threat."[13] **Whether this condition has been met at this time is part of an objective inquiry, and if you are unsure, you should consult with your attorney.**

Moreover, as COVID-19 is a transitory condition, it likely does not qualify as a disability under the ADA,[14] but questions about illness can go too far and implicate actual disabilities. For example, asking if an employee if they feel sick is permissible but asking if they have a condition that makes them susceptible to COVID-19 would not be permissible, as the response is likely to disclose the existence of a disability.[15]

Practically, however, if an employee appears sick with a fever, cough, or difficult breathing, an employer should make sure its supervisors know not to overreact (and cause panic) but to also encourage such employees to seek medical attention. Supervisors may ask employees if they are experiencing fever or chills *and* a cough or sore throat. Supervisors should *not* conduct any medical testing of employees themselves, including the taking of temperature.[16] If supervisors are concerned, then they should ask an employee with COVID-19 symptoms to leave work, and the supervisor should document the observation of any symptoms of contagious illness.

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[13] https://www.eeoc.gov/facts/pandemic_flu.html#4. Whether a condition is a "direct threat" is determined based on (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm. 29 C.F.R. § 1630.2(r); 29 C.F.R. pt. 1630 app. § 1630.2(r).

[14] The ADA also recognizes "regarded as" plaintiffs, meaning that an employee without a disability can still have a claim if the employer "regarded" the employee to have a disability.

[15] Such inquiry is only allowed when there is objective evidence that pandemic symptoms would cause a direct threat.

[16] This could be permissible should CDC increase the health risk in the U.S. associated with COVID-19, but at this time, supervisors should not take employees' temperature or otherwise examine employees' medical condition.

C. The Occupational Safety and Health Act

If employees refuse to come to work because they fear getting infected, that situation is governed, in part, by the Occupational Safety and Health Act ("OSHA"). OSHA allows employees to refuse to work in that situation only if they believe they are in imminent danger. Whether this condition has been met at this time, again, is part of an objective analysis of a multi-factor test involving a rapidly developing environment. Before taking action, you should consult with your attorney. As described below, we do not believe that situation is met at this time, but this is subject to change. For example, if Texas begins to experience widespread community transmission of COVID-19 as assessed by state and local and/or federal authorities, our analysis may change. Alternatively, if an employee demands to use a mask during work, OSHA has provided the following conditions must be met in order for that employee to have a right to the use of personal protective equipment ("PPE"):

1. The employee unsuccessfully asked the employer to eliminate the danger;

2. The employee refused to work in good faith, *i.e.*, that they genuinely believed they were in imminent danger;

3. A reasonable person would believe there is a real danger of death or serious injury; and

4. The urgency of the hazard does not allow sufficient time to correct the hazard through regular enforcement channels such as requesting an OSHA inspection.

If imminent danger is not found, then the above factors likely will not be met for anyone who is not exhibiting symptoms and/or is not a medical professional – particularly where both state and federal officials have indicated that face masks are unnecessary.[17]

Lastly, if any employees object to any of their employer's practices on behalf of others or discuss with other employees any frustrations with such practices, these conversations will likely constitute concerted protected activity under Section 7 of the NLRA. **BC Firm strongly recommends you consult with counsel before taking any action relating to such objections in order to ensure your business does not violate any employee protections.** If you have any questions on how the above employment laws may apply to your business, we are available to assist you.

[17] This discussion does not include OSHA guidelines on employees more likely to be exposed to COVID-19 in the workplace. If an employer is in the healthcare industry, biohazard remediation industry, or viral laboratory industry, among other high-risk professions, higher safety protocols would have to be in place. Moreover, all employees owe a general duty to keep employees safe from workplace hazards, so this baseline standard should be kept in mind when discussing how to protect your employees.

VI. EMPLOYEE HEALTH BEST PRACTICES

As COVID-19 becomes more widespread in the United States, employees are asking employers for guidance on how to handle themselves in the workplace to avoid infection. The CDC has provided interim guidance to help prevent workplace exposures to acute respiratory illnesses in non-healthcare settings. **Critically, the CDC has advised employers *not* to make risk determinations based on race or country of origin and to maintain confidentiality of people with confirmed COVID-19 (a requirement of the ADA).**

The below summarizes the CDC's guidance, and any updates and more specifics may be found at https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html.[18] **Please note, however, that any actions must follow the ADA and FMLA requirements summarized above and other applicable law.**

A. Actively encourage sick employees to stay home:

1. Employees who have symptoms of acute respiratory illness are recommended to stay home and not come to work until they are free of fever (100.4° F [37.8° C] or greater using an oral thermometer), signs of a fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines (e.g. cough suppressants). Employees should notify their supervisor and stay home if they are sick.

2. Ensure that your sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies.

3. Talk with companies that provide your business with contract or temporary employees about the importance of sick employees staying home and encourage them to develop non-punitive leave policies.

4. Do not require a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way.

5. Employers should maintain flexible policies that permit employees to stay home to care for a sick family member. Employers should be aware that more employees may need to stay at home to care for sick children or other sick family members than is usual.

[18] OSHA has also published pandemic-related best practices which can be found here—https://www.osha.gov/Publications/influenza_pandemic.html#lower_exposure_risk

B. Separate sick employees:

1. CDC recommends that employees who appear to have acute respiratory illness symptoms (i.e. cough, shortness of breath) upon arrival to work or become sick during the day should be separated from other employees and be sent home immediately. Sick employees should cover their noses and mouths with a tissue when coughing or sneezing (or an elbow or shoulder if no tissue is available).

C. Emphasize staying home when sick, respiratory etiquette and hand hygiene by all employees:

1. Place posters that encourage staying home when sick, cough and sneeze etiquette, and hand hygiene at the entrance to your workplace and in other workplace areas where they are likely to be seen.

2. Provide tissues and no-touch disposal receptacles for use by employees.

3. Instruct employees to clean their hands often with an alcohol-based hand sanitizer that contains at least 60-95% alcohol or wash their hands with soap and water for at least 20 seconds. Soap and water should be used preferentially if hands are visibly dirty.

4. Provide soap and water and alcohol-based hand rubs in the workplace. Ensure that adequate supplies are maintained. Place hand rubs in multiple locations or in conference rooms to encourage hand hygiene.

5. Visit the coughing and sneezing etiquette and clean hands webpage for more information.

D. Perform routine environmental cleaning:

1. Routinely clean all frequently touched surfaces in the workplace, such as workstations, countertops, and doorknobs. Use the cleaning agents that are usually used in these areas and follow the directions on the label.

2. No additional disinfection beyond routine cleaning is recommended at this time.

3. Provide disposable wipes and anti-bacterial hand sanitizer in areas of heavy traffic so that commonly used surfaces (for example, doorknobs, keyboards, remote controls, desks) can be wiped down by employees before each use.

E. Advise employees before traveling to take certain steps:

1. Check the CDC's Traveler's Health Notices for the latest guidance and recommendations for each country to which you will travel. Specific travel information for travelers going to and returning from China, and information for aircrew, can be found at on the CDC website.

2. Advise employees to check themselves for symptoms of acute respiratory illness before starting travel and notify their supervisor and stay home if they are sick.

3. Ensure employees who become sick while traveling or on temporary assignment understand that they should notify their supervisor and should promptly call a healthcare provider for advice if needed.

4. If outside the United States, sick employees should follow your company's policy for obtaining medical care or contact a healthcare provider or overseas medical assistance company to assist them with finding an appropriate healthcare provider in that country. A U.S. consular officer can help locate healthcare services. However, U.S. embassies, consulates, and military facilities do not have the legal authority, capability, and resources to evacuate or give medicines, vaccines, or medical care to private U.S. citizens overseas.

VII. MARITIME EMPLOYEE CONSIDERATIONS: MAINTENANCE AND CURE

In our region, it is worth noting that COVID-19 also presents a unique situation for maritime employers. Seamen injured at sea are entitled to what is called "maintenance and cure." These terms each refer to separate obligations. For maintenance, an employer is responsible for a seaman's day-to-day living expenses, while cure refers to the medical costs incurred by the seaman. Maintenance and cure obligations continue from the time that the seaman becomes injured (or becomes ill) while performing services in furtherance of the vessel until the seaman is fit for duty or has become as well as medical treatment will allow (known as maximum medical improvement ("MMI")). *See Calmar S.S. Corp. v. Taylor*¸ 303 U.S. 525 (1938).

If an employee becomes ill with COVID-19 while working as a seaman on a vessel, then their employer will be liable for the maritime version of workers' compensation. Maintenance obligations however do not have statutorily set dollar obligations, so daily obligations may vary considerably. Moreover, cure obligations include all necessary medical care such as hospitalization, emergency medical care, medications, and in some circumstances, transportation to and from the health care provider. Therefore, when your seamen are determined to have COVID-19, your obligations don't just end when you send

them to the hospital. Your maintenance and cure obligations continue, and it can be difficult to determine when exactly the seaman has become fit or duty or has hit MMI. For this reason, some employers use independent physicians to do this analysis to avoid any bias associated with the treating physician. However, as COVID-19 is an infectious disease, this could be problematic, so consult with your attorney before taking action. **If you have questions regarding maritime employee obligations, our firm is available to assist you.**

VIII. INSURANCE

A. Business-related Insurance Considerations:

A variety of insurance policies may provide coverage for COVID-19-related claims, losses and/or extra expenses including: (i) business interruption and contingent business interruption, and (ii) commercial general liability (CGL).[19]

While determining coverage for such losses will depend on the circumstances, policy wording, and applicable state law, businesses should proactively manage their COVID-19-related losses by evaluating the existence of, and likelihood of success in asserting claims for, coverage under various policies. This is not only necessary to evaluate and manage the financial impact of COVID-19 on your business but goes hand-in-hand with your business's ability to comply with any prompt or timely notice of claim provisions under your policy.

B. Business Interruption Coverage & Contingent Business Interruption Coverage:

Generally, Business Interruption ("BI") coverage is triggered by the policyholder experiencing a "direct physical loss of or damage to" insured property by a covered cause of loss. In the case of BI coverage under an "All Risk" policy business owners' policy, coverage is triggered when an ins sustains a "direct physical loss of or damage to" insured property by a cause not expressly excluded by the wording of the policy.[20]

Under Contingent Business Interruption ("Contingent BI") coverage, policies will typically afford coverage for economic damages sustained due to disruptions to your business's customers or suppliers provided the underlying cause of loss would otherwise

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[19] Other available coverage may be found in certain industry-specific policies including, but not limited, to directors & officers ("D&O) coverage (in particular, crisis management coverage, derivative suit liabilities, among others), workers' compensation insurance, political risk insurance, and event cancellation insurance, among others. Additionally, certain specialized insurance endorsements may also provide coverage including those afforded to healthcare and hospitality industries.

[20] Both types of BI policies may also include coverage for extra expenses incurred because of an otherwise covered loss.

be covered under the policy (*i.e.*, a loss covered if sustained by the business's insured premises).

When faced with a COVID-19 claim, many insurers may take the position that the "physical loss" prerequisite is not met. This does not end the inquiry, however, as different jurisdictions interpret the meaning of "physical loss" in different ways with several courts having determined contamination and other factors that render an insured property "uninhabitable" or otherwise unfit for its intended use may satisfy the "physical loss" requirement.

And certain BI policies also provide coverage when "civil authority" impacts access to the insured's premises. In such cases, and depending on the specific wording of the policy, a claim may be that a policy's "civil authority" coverage is triggered even absent a "physical loss" to the extent "civil authority" coverage is not tied to the same "physical" damage requirement.

On March, 16, 2019, Oceana Restaurant, a Louisiana establishment in the French Quarter, sued its London insurers seeking a declaratory judgment that its business interruption insurance policy provides coverage making precisely these arguments.[21] Oceana claims it sustained, and continues to sustain, business income losses, among other damages, as a result of (i) Governor John Bel Edwards' March 13, 2020 order banning gatherings of 250 or more people, and (ii) Mayor Latoya Cantrell's March 15, 2020 order requiring full-service restaurants to limit their seating capacity by 50% and close by 9 p.m. CDT – both of which it maintains have affected its ability to operate at capacity (500 guests). Oceana maintains coverage is due under the "civil authority" coverage grant of its "all risk" BI policy as COVID-19, and global pandemics generally, are not specifically excluded from coverage.

While the case is in its initial stages, its filing is a sign of coronavirus insurance coverage litigation to come. Louisiana courts have found intrusion of "abstract" impacts to premises may satisfy the "direct physical" loss requirement of BI policies.[22] However, whether and under what circumstances Louisiana courts will extend coverage based to COVID-19 impacts under "civil authority" and whether COVID-19's ability to "infect" physical spaces through "fomites" will satisfy the "physical damage" threshold where such damage is required, will be determined on a case-by-case analysis of the specific policy wording and applicable state law under which the contract is interpreted.

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21 *See generally Cajun Conti, LLC, et al. v. Certain Underwriters at Lloyd's of London, et al.*, Civ. No. 20-02558, Civil District Court, Orleans Parish, State of Louisiana.

22 *See Widder v. La. Citizens Prop. Ins. Corp.*, 2011-0196 (La. App. 4 8/10/11); 82 So. 3d 294, 296, *writ denied*, 2011-2336 (La. 12/2/11)) (holding the intrusion of lead or gaseous fumes constitute direct physical loss).

C. Commercial General Liability Coverage:

COVID-19 presents both bodily injury and property damage claims for businesses. Commercial General Liability ("CGL") policies typical provide coverage for an insured's liability as a result of such damages provided the cause of loss takes place during the policy period (otherwise referred to as "occurrence" based policies), meets the definition of a covered loss, and is not otherwise excluded. CGL policy definitions for property damage are typically broader than traditional property insurance policies and may include coverage for economic losses resulting from covered bodily injury or property damage claims.

The key to coverage will turn on the specific policy wording and circumstances of each case. And, importantly, coverage may be found in a myriad of different policies. It is, therefore, important to review all of your policies when determining available coverages. If your business requires assistance evaluating insurance coverage for COVID-19-related claims or losses, our firm is available to assist you.