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Flattening the Risk Curve on Executive Liability – An Analysis of COVID-19 on Management and Professional Liability

On March 11, 2020, the World Health Organization deemed the COVID-19 outbreak a pandemic. Equity markets have been in sharp declines and supply chain and business interruption issues are severely hurting the overall economy. All Directors, Officers, and Executive Leaders are dealing with challenges related to COVID-19 and many businesses have been shut down (not by their own choice). Those that remain open have had to drastically change their business models, product offerings, and employment models including teleworking. This article looks to address the impact of COVID-19 on management and professional liability policies. With changes occurring daily (if not hourly), management liability policies are likely to be triggered in some fashion as a result of COVID-19.

Directors & Officers Liability

With equity markets in turmoil, we see a large risk for publicly traded companies in relation to COVID-19. Many public companies have looked to adjust their guidance as a result and what/how they disclose could be tricky. With daily changes to the situation surrounding COVID-19, the disclosure requirements could be absent or highly unpredictable. Additionally, claims could arise alleging mismanagement by company leadership in their response or lack of alternative plans for the response to COVID-19. SEC chair Jay Clayton stated, "We also remind all companies to provide investors with insight regarding their assessment of, and plans for addressing, material risks to their business and operations resulting from COVID-19 to the fullest extent practicable to keep investors and markets informed of material developments. How companies plan and respond to the events as they unfold can be material to an investment decision, and I urge companies to work with their audit committees and auditors to ensure that their financial reporting, auditing and review processes are as robust as practicable in light of the circumstances in meeting the applicable requirements." See SEC press release www.sec.gov/news/press-release/2020-53

The majority of D&O policies exclude bodily injury claims whether for public, private, or not-for-profit entities. Private company D&O policies are extremely broad and thus could have a loophole where coverage could come into play even if just for a defense.

These policies could provide defense for non-bodily injury claims tied to the business aspect of COVID-19. This could include claims by customers, vendors, suppliers, or other third parties that are alleged to have been wronged by way of a business tort-type claim as part of COVID-19. Investment related losses and other business interruption damages could have some looking to Directors and Officers for recovery.

According to MarketScout, D&O premiums have already risen in the first quarter of 2020. In fact, of all property/casualty coverage lines, D&O liability led the way with increases of 7.5% compared to first quarter of 2019. The report also noted, "the pricing impact of COVID-19 will be borne out in the second, third and fourth quarters of 2020." With all these changes, Directors and Officers will be relying on their D&O Liability policy and want to make sure they are covered.

Employment Practices Liability

Employers and employees face all sorts of challenges tied to the pandemic as it relates to hiring, firing, workforce arrangements, teleworking, etc. All employees are having to deal with a changing workplace environment whether that be working from home, not working at all, or having to deal with COVID-19 in their workplace.

One example making headlines dealt with certain Amazon employees holding a walkout at a Staten Island facility in late March demanding increased safety measures and benefits for warehouse workers during the COVID-19 pandemic. New York City's Commission on Human Rights announced an investigation for one of the workers who was fired as part of the protest. Employee chat groups and leaked emails continue to show additional headline risk along with the organization of other activist labor groups concerned about similar working conditions in their respective industry. Labor conditions are one of many challenges employers are having to deal with and we expect retaliation claims as a result of these situations. During the COVID-19 pandemic, many employers are unfortunately having to deal with reductions in force (RIFs) which can often lead to wrongful termination claims or class action claims, to name a few. COVID-19 poses greater risk to those with underlying conditions who, if terminated, could also file discrimination claims.

The EEOC issued the following on **Pandemic Preparedness in the Workplace and the Americans With Disabilities Act:** eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_COVID-19.cfm

With rapid changes as a result of COVID-19, employer and employee responses are likely to change as well. EPL policies could be triggered in a variety of ways. Employees could allege they were mistreated while their employer was trying to control a healthy work environment. They could also allege discrimination or wrongful termination tied to COVID-19. Recent legislation with the Families First Coronavirus Response Act (FFCRA) including the Emergency Family and Medical Leave Expansion Act and Emergency Paid Sick Leave Act could also pose challenges to employers and employees still open for business during COVID-19.

Crime and Cyber Liability

Cyber criminals never sleep and they are seeing this as a great opportunity to steal data or money from victims. This is an ideal time to use fear, anxiety, and deception caused by COVID-19. We have already seen an uptick in phishing and social engineering scams. Cyber criminals could pose as the company's IT group helping them to get set up from home. They could pose as a health regulator, government agency, or school district hoping a victim clicks on a malicious link or send them funds believing they are going to a charitable organization to help COVID-19 victims. Cyber criminals will try to deceive and trick victims into giving up forthcoming stimulus checks and other financial assistance (loans or other financial aid). With many employees working from home (some for the first time) they may be using older, less reliable, and unsecure devices, which could expose companies to cyber criminals. If deploying IT assets to employees to work from home, IT should ensure strict protocols are implemented to protect the network from those using it from home. IT and employees should consider the following with these arrangements as both need to work together to secure a safer work environment:

1. Make sure loaned assets have the same built in security as devices controlled by IT
2. Be sure updates or patches are followed and updated promptly
3. Make sure new devices involve IT security staff setting up those devices
4. Use VPN to access company systems
5. Use multi-factor authentication (MFA) with strong/unique passwords that are changed regularly
6. Perform independent callbacks and verification for vendor or client payment changes, wire transfers, etc.
7. Never give out company or log in credentials, especially when requested by email

A best practice historically was to walk down and ask the individual who allegedly made the request for money or data if they truly asked for such items. Many times the fraud gets caught when this happens. In the current environment, this may no longer be possible and the cyber criminals know it and may look to exploit it. Employees may be rushed or unable to do this and, with email fatigue, may fall victim to these scams. Crime and cyber policies may also be the difference between a company making it through this difficult situation if they fall victim to one of these scams.

Professional Liability (E&O)

Professional liability insurance attempts to cover negligence or failure to provide a professional service to a customer/client for a fee. With remote working conditions, many companies may be dealing with staff shortages or other issues and find themselves dealing with risk or inability to deliver on promised professional services and business contracts. This could include business units who are infected with COVID-19 or refuse to work given perceived unsafe work conditions associated with COVID-19. Many of these professional service agreements have deadlines or other milestones which, if not met, could lead to an increase in professional liability claims. Disruptions to service may also exist as employees are working from home and may not have the same tools they have in their normal business settings, leading to an increase in E&O claims. With heavy outsourcing, many service providers, contractors, and other suppliers may have the same issues which, if unable to service your needs, could in turn lead to exposure to E&O claims from your clients. Healthcare facilities (especially nursing homes and long-term care facilities) are dealing with all sorts of challenges exposing them to E&O risks while they are trying to provide medical care for those that are at high risk for COVID-19. Other healthcare providers are having to be prepared for telemedicine exposures, including privacy or other related exposures tied to documentation of medical care. With all the uncertainties in the economy and the ability to provide professional services, E&O policies will be of great importance to help defend a company from E&O claims. Those that manage and survive the crisis and maintain existing clients may be well positioned for new business in the future.

Summary

When rapid business changes are occurring, executive risk policies could provide important protection to the company and business owners. In some instances, these policies could even be what saves a company from bankruptcy or gets them through the COVID-19 crisis. These policies are not created equal and are not standardized. Coverage changes evolve rapidly and coverage terms and exclusions vary from carrier to carrier. Given all the above changes and uncertainties, all insurance contracts/policies will surely see changes. It is important to start renewals early, especially if COVID-19 exclusions or limitations find their way into upcoming renewals. However, many carriers are getting stricter on releasing any terms beyond 30 days of renewal. Please contact your Moreton & Company representative for further questions related to navigating the COVID-19 crisis.