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# COVID-19 Insurance Update: Significant Differences Among Proposed Laws to Require Property Insurers to Pay COVID-19 Business Interruption Claims

by Patrick Frye

A FREEBORN & PETERS LLP CLIENT ALERT


## ABOUT THIS CLIENT ALERT

This Alert details the differences between proposed laws designed to require property insurers to pay insureds for their lost profits during the COVID-19 pandemic.

Legislators in a number of states and in Congress have proposed laws designed to require property insurers to pay insureds for their lost profits during the COVID-19 pandemic. While none of these proposals has passed into law, and perhaps none of them ever will, they have differences worth considering now. The proposals would set different thresholds based on the number of employees a named insured has to determine whether or not an insured qualifies for payment. The proposals vary in their mandate of what losses an insurer must pay – some would reach more losses than just those caused by COVID-19. They also vary in whether they offer possible reimbursement to the insurers that these proposals would obligate to make these payments. These different proposals do share at least one thing in common: It is likely that payments will not be forthcoming until after the final adjudication over the constitutionality of any of these proposals that does get enacted.

**Number of employees**

Being intended to protect smaller employers, most proposals would only mandate payments under certain property insurance policies issued to insureds below a threshold number of employees. The most common number proposed is 100 employees. Two states' proposals would set this threshold at or fewer than 150 employees, and one proposal submitted in New York would have it at fewer than 250 employees. A proposal in Pennsylvania would make 100% of an insurance policy's limits available to any "small business" (as recognized by the federal government) insured under that policy and only 75% of those limits to anyone else. Proposals submitted in Congress and in Louisiana have no threshold at all and so would apply to every insured regardless of its size. The proposals offer different methods for counting employees. Only "full-time" employees would be counted, but some proposals define this employee as someone who normally works at least 25 hours a week, and others offer no definition at all. Under the proposed 150-employee threshold, "full-time equivalent employees," instead of actual employees, would be counted.

Consider an insured employer of 60 people who work 30 hours a week and 95 more people who work 40 hours a week. If employees are counted only when they work 40 hours a week, then this insured has only 95 employees and falls within the 100-employee threshold. But if employees are counted when they work at least 25 hours a week, the insured's workforce is too large for this insured to qualify because it has 155 employees, and therefore this insured would receive no payment. But the same insured would receive payment if the threshold were 150 full-time equivalent employees, because this insured's count for that type of employee is 140.[1]

1 Full-time equivalent employees are essentially calculated by dividing the workforce's total hours worked by the employer's hours for a full-time work week. We assume a 40-hour work week for the purposes of this example. 140 = ((60 people * 30 hours weekly) + (95 people * 40 hours weekly)) / 40 hours weekly

Another wrinkle: Most of the proposals impliedly ignore out-of-state employees by counting only employees in the state. The New York proposals set the employee threshold without specifying that they must be in the state. The Ohio proposal would expressly apply to any policy issued to a business that both is located in the state and has fewer than 100 employees – but this proposal does not clarify that these employees must all be in the state, too. An insured's entire workforce might be counted should these bills become law.

**Scope of losses to be paid**

The proposals generally apply to claims for losses related to COVID-19, but vary widely in how they describe the losses that must be paid. Three would apply to losses resulting directly or indirectly from, or due to the imminent threat of, COVID-19. Of those, two specify that the loss must occur while that state's declaration of emergency remains in effect. The third – South Carolina's – does not. A fourth proposal, submitted in Pennsylvania, applies to losses due to either COVID-19 or any civil order related to the declared emergency caused by COVID-19.

Other proposals are not so directly tied to losses caused by COVID-19. The proposals in New York apply to all losses during the declared state of emergency due to the COVID-19 pandemic. If understood literally, this proposal would require payment for any business interruption during that time period, regardless of whether that interruption has anything to do with COVID-19. Many proposals apply to global viral transmission or pandemics but do not necessarily specify which ones. Two of those qualify these pandemics by reference to the state's declaration of emergency, which is specific to COVID-19. A third – Ohio's – would limit the losses to those due to a viral pandemic during the current state of emergency. This proposal might be read to require payments for the lost profits caused by a second deadly and far-flung virus should we suffer that misfortune before the current pandemic is over.

The proposal before Congress would mandate coverage not only for losses from any viral pandemic, but also for any government's forced closure of businesses – regardless of the reason for the closure. Whereas the state proposals usually specify that they apply only to policies that already exist or come into existence before the end of the COVID-19 emergency, the federal proposal would apply to future post-emergency business-interruption insurance policies as well.

As we explained in a prior alert, two key arguments insurers make in refusing to pay COVID-19 business interruption claims are that COVID-19 is not a covered peril, because it has not caused any physical damage to property as is generally required by property policies, and that coverage is barred by a virus exclusion, which is found in many but not all property policies. All of the proposals would resolve the first argument in the insureds' favor, by expressly designating COVID-19 as a covered peril.

However, not every proposal expressly addresses the virus exclusion. The federal proposal does, by nullifying any existing virus exclusion with explicit disregard of any state regulator's prior approval of it. The proposals in Massachusetts and in South Carolina also expressly override any virus exclusion. One of the Pennsylvania proposals mentions the virus exclusion; while it might be inferred from that mention that the exclusion is overridden, the proposal is not so forthright. The rest of the proposals do not mention any exclusion, so they might be read to distinguish those insureds whose policies do have the exclusion and therefore need not cover COVID-19 business interruption losses from those insureds whose policies do not and therefore must cover these losses.

**Redistributing losses among insurers**

Most proposals would have the insurance industry at large ultimately share in the payments to insureds. The insurers who pay the claims could apply to the state insurance commissioner for reimbursement, and the insurance commissioner would be empowered to levy an assessment on all or part of the insurance industry in order to raise funds to pay the reimbursements. A few proposals – in Louisiana, Pennsylvania, and Congress – offer no such relief to the insurers who must pay and thus would not impose any such burden on the rest of the insurance industry.

**Constitutionality concerns will delay or prevent payments**

As we explained in a prior alert, these proposals raise concerns under the U.S. Constitution that will surely lead to litigation and delay payment of insurance recoveries unless and until the highest court rules to uphold the statute. One proposal, submitted in Pennsylvania, could expedite litigation by vesting that state's Supreme Court with "exclusive" jurisdiction over challenges to the proposed statute's constitutionality. This measure might bypass the state trial and intermediate appellate courts, which both normally hear arguments and render decisions before the state Supreme Court gets involved in a case.

But no state has the power to deny the federal government jurisdiction. An insurer may have the right to have the federal courts resolve the question of this statute's constitutionality.

First the federal trial court will decide, and then the federal intermediate appellate court will review that decision, before the U.S. Supreme Court might choose to decide the question itself. The Supreme Court does not select many cases to review, but considering that COVID-19 has had a remarkable impact on our nation's economic life and that the objection to these proposed laws is rooted in the Constitution, it would not surprise if that Court chooses to decide whether these proposals, if enacted, are constitutional. That process normally takes months if not years.

The proposals discussed above can be found here:

1. U.S. Congress
2. Louisiana (House)
3. Louisiana (Senate)
4. Massachusetts
5. New York (Assembly)
6. New York (Senate)
7. New Jersey (withdrawn)
8. Ohio
9. Pennsylvania (House)
10. Pennsylvania (Senate)
11. South Carolina

**If you have any questions, contact Patrick Frye or visit Freeborn's COVID-19 webpage for more information as this situation develops.**

## ABOUT THE AUTHOR

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Patrick Frye is a Partner in the Litigation Practice Group and member of the Insurance/Reinsurance Industry Team. He represents clients in commercial litigation, including coverage disputes and antitrust claims. He advises clients on litigation strategy and appears before arbitration panels and state and federal courts.

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