
**COVID-19 Webinar:
Insurance Coverage, Debt Servicing and
Workforce Planning Impacts on the Tree Care Industry**

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- Insurance Coverage for COVID-19 Claims and Losses Impacting the Tree Care Industry
- CARES Act: Key Provisions Applicable to the Tree Care Industry
- Dealing with Loans in a Pandemic
- COVID-19 Response – New Laws, Bargaining Obligations and Outstanding Questions

Insurance Coverage for COVID-19 Claims and Losses Impacting the Tree Care Industry

First-Party Insurance

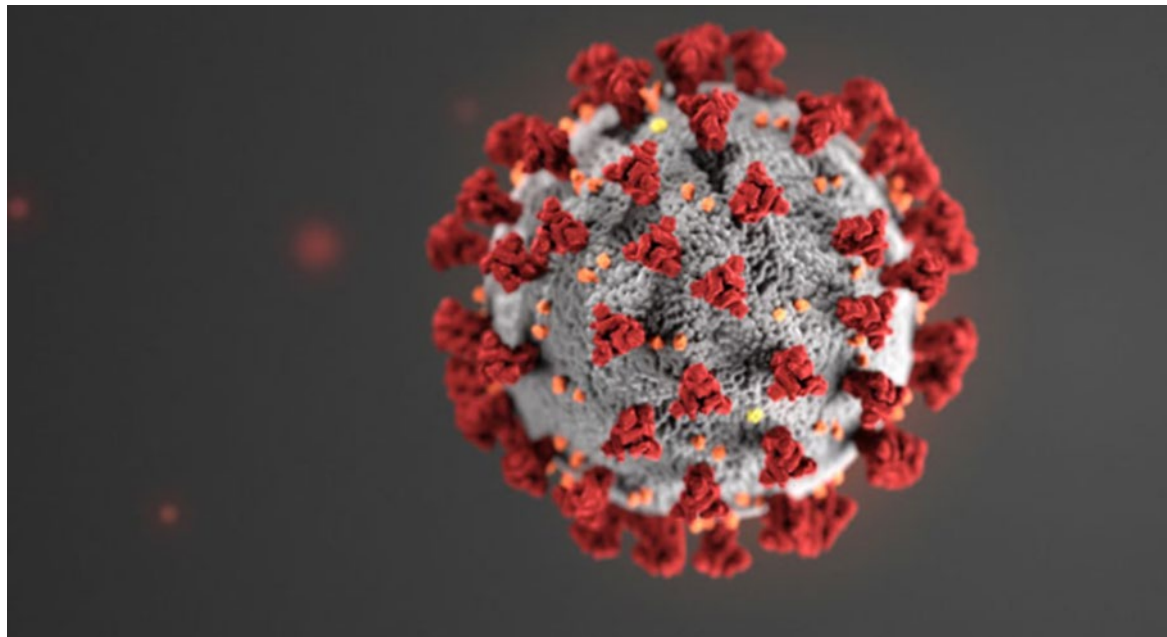
- Commercial Property Insurance
- Business Interruption and Other Time Element Coverages
- Event Cancellation Coverage

Government Response

Third-Party/Liability Insurance

- Commercial General Liability (CGL)
- Directors & Officers Liability (D&O)
- Employment-Related Insurance (WC, EL, EPLI)
- Cyber Insurance – Enhanced Risks

- **Commercial Property Insurance** – Covers physical damage to insured buildings and contents due to a covered cause of loss, and provides other time element coverages.



- **Business Interruption** - Covers loss of income suffered by an insured when damages to its premises cause a slowdown or suspension of operations.



Commercial Property Insurance

- **Extra Expense** - Covers costs necessary to mitigate business interruption loss
- **Civil Authority** - Covers loss resulting from governmental orders due to property damage elsewhere
- **Contingent Business Interruption (CBI)** - Covers losses resulting from an interruption of business at the premises of a customer or supplier (supply chain interruption)
- **Preservation of Property**

Key coverage question

- Is there physical damage?

Key Exclusions & Sublimits

- Contamination/Pollution Exclusions
- Virus or Bacteria Exclusion
- Communicable Disease Sublimit

Other Key Features & Specialized Coverages

- Claim Preparation Costs
- Communicable Disease Coverage/Endorsement

Recent Lawsuits to Enforce Business-Interruption Coverage for COVID-19:

- *Cajun Conti (dba Oceana Grill) v. Lloyd's of London*, (La. Dist. Court, Orleans Parish, 3/17/20)
- *Chickasaw Nation v. Lexington Ins. Co.*, (Pontotoc Cty, OK, 3/24/20)
- *Choctaw Nation v. Lexington Ins. Co.*, (Bryan Cty, OK, 3/24/20)
- *French Laundry v. Hartford Fire Ins. Co.*, (Napa, CA, 3/25/20)
- *Coffey & McKenzie v. Twin City Fire Ins. Co.*, (Clarendon, SC, 3/36/20)
- *Big Onion Tavern v. Society Ins. Co.*, (N.D.Ill., 3/27/20)
- *Billy Goat Tavern v. Society Ins. Co.*, (N.D.Ill, 3/31/20) (class action)
- *Café La Trova v. Aspen Specialty Ins. Co.*, (Miami, 3/31/20)

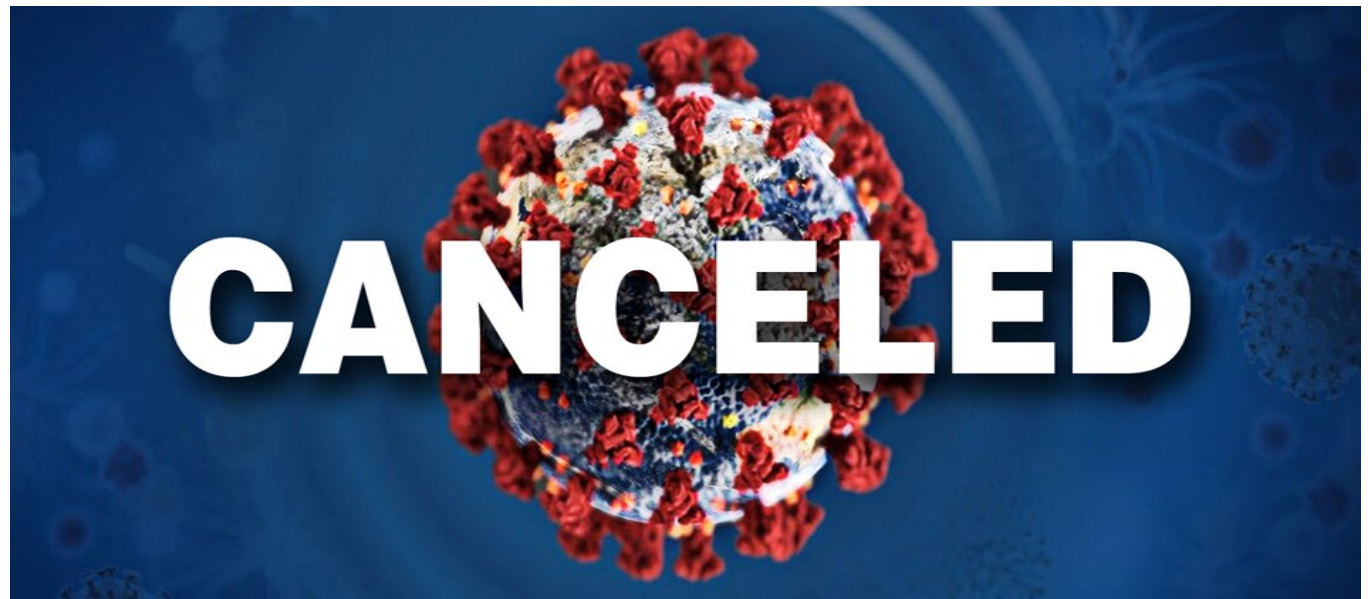
Key Considerations for Business Interruption Coverage

- Has there been a confirmed infection at your premises?
- Have government orders shut down your business (or part of it), or a nearby “attraction” property, due to the virus?
- Have your customers’ properties shut down and impacted your business as a result?
- Has your or your customers’ supply chain been disrupted because of COVID-19?

- Analyze your policies' terms, conditions, and exclusions
- Provide timely notice
- Document your loss

- U.S. Congress?
- State Legislatures
 - New Jersey
 - New York
 - Ohio
 - Massachusetts
 - Louisiana
 - Pennsylvania
- State Regulators
 - New York
 - California

- Covers financial losses arising out of the cancellation, curtailment, or postponement of specified events
- Caused by factors that are beyond the insured's control
- Exclusions
- Notice



- CGL policies generally cover liability for bodily injury and property damage caused to third parties on insured premises
- Examples of COVID-19-related allegations:
 - Sickness caused by insured's failure to take necessary precautions to prevent exposure to infected individuals
 - Insured's failure to have proper procedures and plans in place
 - *Weissberger v. Princess Cruise Lines* (C.D. Cal. 3/12/20)
 - Individuals quarantined on Grand Princess off CA coast allege company's failure to take precautions to prevent a coronavirus outbreak on the ship after two passengers on the previous sailing disembarked with symptoms
- To the extent that a customer, guest, or other third party alleges bodily injury or property damage as a result of an insured's negligence, there should be coverage absent an applicable exclusion

- Pollution exclusion
 - *Westport Ins. Corp. v. VN Hotel Group, LLC*, 761 F. Supp. 2d 1337, 1343–44 (M.D. Fla. 2010), aff'd, 513 Fed. Appx. 927 (11th Cir. 2013)(finding pollution exclusion inapplicable, as **Legionella bacteria is not a pollutant**)
- Virus/bacteria exclusion
 - Post-2003 (SARs outbreak) exclusion for loss caused by any “virus, bacterium, or other micro-organism that induces or is capable of inducing physical distress, illness or disease”
- Analyze policy for such exclusions and any endorsements that can change or add coverage and are specific to each policy
- Consider policy construction rules in applicable jurisdiction
- Broad Duty to Defend – Potentiality and Eight-Corners Rule
- Significance of “because of” language in GL insurance policies

Directors & Officers (D&O) Liability Insurance

- D&O Coverage
 - Defense and indemnity coverage for companies and their directors and officers
 - Wrongful acts arising from responses or lack of response to COVID-19 outbreak
 - Allegations of failure to properly prepare for COVID-19 and failure to have proper procedures and plans
 - Ask: Are there concerns that business-interruption losses and related claims by counterparties, shareholders, or others could lead to claims against the company or its officers and directors?
 - **Norwegian Cruise Line Class Action:** Shareholder Litigation for violations of statutes and policies.
 - Bodily injury exclusion?
 - Crisis Management Coverage: Covers public relations costs, travel and other expenses that the insured incurs as a result of a triggering event, which can include announcement of widespread layoffs, notice of claims against insured, or sickness or disease that the insured was alleged to have caused

Employment-Related Coverages

**Workers' Compensation
(WC)**

**Employer's Liability (EL)
Insurance**

**Employment Practices
Liability Insurance (EPLI)**

Increased cyber risks faced by businesses during COVID-19 crisis:

- Social Engineering and Phishing Schemes
- Ransomware Attacks and Cyber Extortion
- Internal and External System Vulnerabilities
- Network Interruption and Dependent Business Interruption
- Rogue Employees
- Lost Hardware



- Take inventory of your insurance policies
- Gather the facts and other details of your claim
- Analyze the specific terms and conditions of your policies in view of the facts of your claim
- Notify your insurers – analyze timing and other notice requirements in all applicable policies.
- Consider Other People's Insurance (OPI)

CARES Act: Key Provisions Applicable to the Tree Care Industry

Key Components of The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”):

1. The Paycheck Protection Program (“P3”)
2. EIDL Grants
3. The Economic Stabilization Fund

Paycheck Protection Program

The P3 Program allocates roughly \$350 billion to guarantee loans for small businesses through the SBA 7(a) loan program

The P3 program covers the period of February 15, 2020 until June 30, 2020 (subject to expansion by Congress)

Which Businesses Are Covered?

- Any business which employs 500 employees or less (including both full-time and part-time employees)
- Otherwise SBA eligible

But Normal Affiliation Rules Apply

- May have to include employees of businesses with related ownership or management

Maximum Loan Amount

- The lesser of: (1) \$10,000,000; or (2) 250% of the applicant's monthly payroll costs for the preceding one-year period
- Seasonal businesses can elect to use the average monthly payroll for the 12-week period beginning February 15, 2019, or March 1, 2019, and ending June 30, 2019
- The maximum loan amount is reduced by any EIDL grant provided to any eligible employer on or after January 31, 2020

Streamlined Loan Diligence Procedures

- The SBA has announced that it will relax certain procedures in the loan origination diligence period to get money to borrowers faster

Allowable Uses of Loan Proceeds

- At least 75% of the proceeds must be used for payroll costs and other specified benefits
- Remaining 25% can be used for rent, interest on debt, utilities

Reduced Certification Requirements for Use of Funds

- Unlike a typical SBA loan, the CARES Act does not require the applicant to demonstrate its inability to find credit elsewhere
- Applicants must, however, make certain good faith certifications

Loan Forgiveness

- Loans will be forgiven based on certain expenses of the company paid during the 8-week period after loan origination
- The specified expenses are offset by personnel/payroll reductions during the covered period (except for re-hires)

Loan Deferment

- At least 6-months for business in operation on February 15, 2020
- Applies to both to existing 7(a) loans and new loans under the P3 program

Temporary Bankruptcy and Tax Relief

- Increases the debt threshold under the Small Business Reorganization Act (the “SBRA”) from \$2,725,625 to \$7,500,000 for one year

Authorizes emergency grants of up to \$10k to eligible businesses which have been in business for at least one year prior to January 31, 2020

Emergency Economic Injury Disaster Loan (“EIDL”)

- Advances of \$10,000 to eligible businesses with not more than 500 employees during the period of January 31, 2020, and ending on December 31, 2020, that apply for a loan under the SBA (7)(b)(2) program
- The grant does not need to be repaid, even if the EIDL loan application is subsequently denied, and can be applied to similar costs and payments as the Paycheck Protection Program

Authorizes the Treasury Secretary to establish a loan program for eligible banks and other lending institutions that lend to midsize businesses

Which Businesses Are Covered?

- Passenger or cargo air carriers
- Businesses important for maintaining national security or US businesses that have not otherwise received adequate economic relief from a loan or loan guaranty under the CARES Act

How Can the Treasury Secretary Use the Fund?

The Treasury Secretary has broad authority to determine the terms, conditions and rates of the loans or loan guarantees, subject to certain restrictions

Portions of the Fund Are Earmarked for Certain Covered Businesses

- \$29 billion for passenger and cargo air carriers and certain related businesses
- \$17 billion for critical national security businesses

Prohibition on Loan Forgiveness

- Unlike the P3 program, no loan forgiveness relief

Tax Treatment

- Loans or guarantees must be treated as indebtedness for the purpose of the Internal Revenue Code

New Programs

1. Direct Loan From the Federal Reserve

- Certain restrictions on operations are imposed during the term of the loans and for one year after repayment

2. Assistance for Mid-size Businesses

- The Treasury Secretary may establish a loan program for banks and other lenders that make direct loans to eligible businesses having between 500 and 10,000 employees subject to a maximum interest rate of 2%/annum
- No principal or interest due for the first six months

3. Main Street Lending Program

- The Federal Reserve may establish a loan program for small and mid-size businesses on terms and conditions consistent with Section 13(3) of the Federal Reserve Act.

COVID-19 Response – New Laws, Bargaining Obligations and Outstanding Questions

Families First Act Update: DOL Regs Issued April 1

Quick Recap of Available Benefits:

Paid Sick Leave

- 80 hours (full-time) or two week equivalent (part-time)
- Full pay if leave involves self-care during quarantine or diagnosis
- 2/3 pay if leave involves child out of school/daycare or care for others
- Maximum of \$511 daily/\$5,110 total (or \$200 daily/\$2000 total for childcare)

Family Medical Leave Expansion

- Up to 10 additional weeks
- **Only permissible reason:** to care for child out of school or childcare because of virus
- Paid at 2/3 employee's usual rate, job-protected
- Maximum of \$200 daily/\$12,000 total

How do I determine if I have more/fewer than 500 employees?

- All FT and PT employees count (PT count the same as FT)
- Measurement taken from the date an employee requests leave
- Furloughed/laid off employees **don't count**
- Independent contractors **don't count**
- Cannot combine separate corporations unless they meet “joint employer” test under FLSA or “integrated employer” test under FMLA....**Is This A Good Idea??**

Does not apply if:

- Employees are furloughed or terminated
- Employees not scheduled to work or business is closed for any reason
- **If employer agrees**, employees may take intermittent leave under expanded FMLA
- Does not expand duration of FMLA entitlement
 - 12 weeks in 12 month period maximum

Unclear: can employer require paid Expanded FMLA to run concurrently with other employer-provided PTO?

- Exception for “Emergency Responders”
- Employer eligible for payroll tax credits equal to full amount of benefits paid out under FFCRA
- Must maintain documents to support grants of leave to employees under the Act
- If employer taxes are less than benefit paid out, can apply for direct refunds from US Treasury

Sets Up Two Parallel Unemployment Programs

- Supplement to Existing State Law Program (§§2104; 2107)
 - Additional \$600 per week, if otherwise eligible for state UI, through July 31, 2020
 - Extends unemployment eligibility for 13 additional weeks (most states go to 26), if exhausted UI but are able, available and actively seeking work.
 - Benefit amount = state benefit + \$600, through July 31, 2020
 - Every state expected to participate
 - Weeks beyond July 31, 2020 reimbursed at state levels
 - \$600 payment is NOT prorated for part time hours

- New Federal Program (§§2102)
 - Up to 39 weeks of benefits for individuals who are not eligible for state or federal unemployment, including self-employed workers, independent contractors, and those who have exhausted all rights to state benefits, through December 31, 2020.
 - Individuals must be unemployed, “partially unemployed,” unable or unavailable to work due to a variety of COVID-19 related reasons, or because their business is “closed.”
 - Individuals receiving paid sick leave or other paid leave benefits are not eligible.
 - Benefit amount = state benefit they would otherwise receive + \$600 through July 31st (goes back to state benefit level after that)

- Still some questions
 - If you are laid off, but employer continues paying your benefits, are you disqualified? (may depend on which program)
 - If you are laid off, but the business is not “closed” are you disqualified under the federal program?
 - If you are furloughed but paid a small amount of wages/salary, are you disqualified (may depend on which program)
 - What does it mean to “have to quit” your job because of COVID?
- DOL guidance clarifies some of these questions

§ 4003 provides for loans to mid-sized businesses impacted by COVID-19. There are important stipulations accompanying these loans:

- Cannot outsource jobs for term of loan
- Must retain 90% of workforce through Sept. 30
- Must restore 90% of pre-Feb. 1 workforce
- Cannot abrogate existing collective bargaining agreements for the term of the loan, plus two years after repayment
- Business ***must remain neutral in any union organizing effort for term of the loan***

- Are COVID-19 related contingency actions subject to bargaining with your union?
- Consider terms of CBA first
 - Force majeure provisions?
 - Applicable zipper/management rights clauses? (*MV Transportation*)
 - Governmental Order mandating employer action at odds with CBA provisions (e.g., orders to shut down non-essential businesses)?
 - Effects bargaining obligations?

- CBA doesn't apply? NLRB recognizes economic exigency exception to general duty to bargain
 - Unforeseen emergency compels prompt action
 - Only applies if employer response must be immediate
 - Ends when exigency ends
 - May still have to bargain over effects of action

- Practical Impacts/Benefits of Involving the Union?
- Bottom Line: Probably advisable to make good-faith effort to work with Union, but make decisions necessary for maintenance of business

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Coronavirus (COVID-19) Resource Center:

<https://www.huntonak.com/en/coronavirus-resource-center/>

Banking and Financial Services Pandemic Resource Center:

<https://www.huntonak.com/en/coronavirus-resource-center/banking-and-financial-services-pandemic-resource-center.html>

Insurance Coverage Pandemic Resource Center:

<https://www.huntonak.com/en/coronavirus-resource-center/insurance-coverage-covid-19-resource-center.html>

Labor and Employment Pandemic Resource Center:

<https://www.huntonak.com/en/coronavirus-resource-center/labor-and-employment-business-immigration.html>

Real Estate Pandemic Resource Center:

<https://www.huntonak.com/en/coronavirus-resource-center/real-estate-pandemic-resource-center.html>