Client Alert: The Coronavirus – D&O, EPL, and Wage & Hour Insurance

In the wake of the coronavirus (COVID-19) public and private companies are evaluating the uncertainty of the financial and operational risk to their organizations.

Directors' and Officers' Liability

Public companies face increased uncertainty due to regulatory disclosure obligations. On March 4, 2020, in recognition of the disclosure challenges posed by COVID-19, the Securities and Exchange Commission (SEC) Chairman Jay Clayton stated, "The health and safety of all participants in our markets is of paramount importance. While timely public filing of Exchange Act reports is a cornerstone of well-functioning markets, we recognize that this situation may prevent certain issuers from compiling these reports within required timeframes."

The SEC followed the Chairman's comments with an Order granting temporary regulatory disclosure relief to companies (https://www.sec.gov/rules/other/2020/34-88318.pdf). Subject to certain criteria set forth in the Order, publicly traded companies with disclosure obligations between March 1, 2020 and April 30, 2020 are being given an additional 45 days to meet certain regulatory disclosure requirements. The Chairman, however, went on to note, "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 the coronavirus 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. Companies providing forward-looking information in an effort to keep investors informed about material developments, including known trends or uncertainties regarding coronavirus, can take steps to avail themselves of the safe harbor in Section 21E of the Exchange Act for forward-looking statements."

The SEC emphasized that due to the fluidity of the situation, additional action may be forthcoming.

We have already seen the new wave of "event-driven" securities litigation from cyber breaches, plane crashes, wildfires, and oil spills. It is not hard to imagine how the potential for a global pandemic and a corporation's management or perceived mismanagement, including relating to its corporate disclosures, could result in a D&O claim. Such D&O claim could conceivably be in the form of a shareholder class action or derivative suit stemming from an alleged failure to disclose the impact of the situation on an organization or mismanagement of the "event" (perhaps even a business interruption that materially affected revenue or operations). Shareholder plaintiffs could potentially mount an argument that such mismanagement resulted in a stock drop, corporate waste of resources or funds, or even failure to properly supervise the spread of the outbreak within their organization resulting in physical injury. A class action shareholder suit alleging violations of securities laws or a derivative suit alleging breach of fiduciary duties arising from false or misleading disclosures or corporate mismanagement of a COVID- 19 driven event would be the type of claim expected to be covered under a D&O policy. Predicting the reaction from shareholders and the creativity of plaintiffs' bar is a difficult exercise in fortune-telling; furthermore, the financial and operational risk and ramifications from COVID-19 are developing in real time. That said, it is important to consider the features of both a typical public or private D&O Policy that could be implicated by this potential version of "event-driven" litigation.

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To be prepared, directors, officers and organizations are encouraged to proactively review their D&O insurance policies, paying particular attention to exclusions and limitations. For example, while there is generally no exclusion specific to a COVID-19 event, both public and private D&O policies contain varying forms of a "bodily injury" exclusion limiting the extent of coverage for claims involving "bodily injury [other than emotional distress or mental anguish], sickness, disease, or death of any person, or damage to or destruction of any tangible property, including the loss of use thereof…" The bodily injury exclusion can contain "carve-backs" to the exclusionary language providing further clarity regarding the intent of the exclusion to not apply to securities claims, defense costs, or non-indemnifiable claims. Therefore, simply because a claim arises from or is based upon bodily injury from the COVID-19 virus, coverage may not automatically be excluded.

While most private/non-profit D&O policies also contain certain carve-back language to a "bodily injury" exclusion, some policies have a more absolute exclusion, i.e., "The Company shall not be liable for Loss on account of any Claim based upon, arising from, attributable to, or in any way involving, directly or indirectly…" The "absolute" language is more likely to be applied to industries with higher exposure to bodily injury claims, such as education, healthcare, sports teams, entertainment venues, or real estate.

Some D&O policies may exclude coverage for libel, slander, oral or written defamation or disparagement or invasion of a person's right to privacy. Unfortunately, there have been situations where individuals have been slandered due to their national origin in relation to COVID-19. A scenario can be imagined where an employee's medical condition related to the virus is disclosed without his/her permission. Neither the bodily injury nor the libel/slander exclusion typically apply to allegations that are made as part of an employment practices wrongful act or a securities claim.

A final note should be referenced with regard to D&O program structure and the purchase of Side A (non-indemnifiable coverage). Reference has been made to the potential for "event-driven" litigation to be brought in the form of a derivative suit, by the shareholders on behalf of the company. In general, it is believed that the severity of derivative suits is growing, as evidenced by recent derivative claim settlements in the hundreds of millions of dollars. "Event-driven" litigation, such as that which may arise from COVID-19, could very well manifest itself in a derivative demand and suit. In that event, insurance buyers would be well-advised to reconsider total Side A limits purchased (which typically do not have a "bodily injury" exclusion) to ensure adequate protection for non-indemnifiable loss arising from this type of matter.

As with any insurance policy, the specific facts and allegations of any claim will dictate coverage.

Employment Practices Liability

Employers in all industries, whether public, private or non-profit, are challenged by heightened workplace exposures related and those relating to COVID-19 are evolving rapidly. The risks are abundant and include health concerns, adequate staffing, workplace safety, employee travel, training, managing interruptions in business operations, altering work schedules or in-office attendance, managing return-to-work policies and maintaining employee privacy. Additionally, employers are subject to various state and federal employment laws relating to discrimination, retaliation and employee privacy, which are the basis for potential Employment Practices Liability claims. Employers should work with employment counsel to ensure that they are following key employment laws including the Americans with Disabilities Act (ADA), the Family Medical Leave Act (FMLA), The Genetic Information Nondiscrimination Act (GINA), Health Insurance Portability and Accountability Act (HIPPA) (as applicable), as well as other state and local leave and employee privacy laws. Whistleblower laws and the National Labor Relations Act (NLRA) may provide some employees protections relative to safety and health with respect to scenarios involving employees refusing to work because they believe their health is in imminent danger.

As the event evolves, the applicability of laws may as well. The Equal Employment Opportunity Commission (EEOC), which enforces workplace discrimination laws including the ADA, has provided guidance, which if

a pandemic is declared in the United States, suggests that requiring employees exhibiting virus symptoms to stay home would be permitted under the ADA. They have also provided guidance to assist employers as they navigate the impact of COVID-19 in the workplace (www.eeoc.gov).

Finally, as with any employment practice, there is exposure that may arise from actual or perceived inconsistency in applying and enforcing policies, including making employment accommodations or implementing flexible work arrangements, which may result in allegations of discrimination and/or retaliation. Employers should continue to train employees on the emerging risks and reiterate anti-discrimination and relation policies. Like the D&O, EPL policies contain bodily injury exclusions, and the applicable carve-backs should be carefully assessed.

Wage & Hour Insurance

U.S. employers also need to make sure not to run afoul of U.S. Wage and Hour (W&H) laws. Some employers are facing dramatically reduced business, and therefore, are considering temporary furloughs, reductions in hours, and reductions in pay. For non-exempt employees, employers need to be certain that any changes apply only to future pay, not pay already earned. Future pay must also continue to meet state and federal minimum wage laws, among other concerns. For exempt employees, employers need to determine if and how to reduce pay including whether furloughs need to be instituted and how those furloughs could be executed.

Most importantly of all, employers need to engage their employment lawyers, internally or externally, to review options on how to reduce staff effectively without violating wage laws before taking any steps. On the opposite end of the spectrum, other employers are seeing their business booming because of the outbreak, causing different wage concerns. For these businesses, it is likely more of an issue of making sure that all employees are fairly compensated for additional overtime worked and being certain that all rules around providing meal and break periods are being followed even when the organization is being stretched to its limits. In these instances, companies should reemphasize to managers that they remain diligent in ensuring that employees are recording and getting paid for all time worked while managers are ensuring that employees are taking all required meal and rest periods.

Conclusion

The best advice, whether it be D&O, EPL or Wage & Hour and the applicable insurance policies – review your specific policy coverages and exclusions. Aon's Financial Services Group stands poised to offer guidance relating to the COVID-19 risks and its impact on your executive risk insurance policies. Additionally, Aon's Infectious Disease Response Task Force has established a COVID-19 Response Site (aon.com/coronavirus) to support organizations in mounting effective infectious disease (pandemic) response, and in planning for impacts that may confront businesses, their employees and the communities in which businesses operate and employees reside.