

The background of the entire page is a microscopic view of COVID-19 virus particles. The particles are spherical with a textured surface and numerous protruding spike proteins. They are rendered in shades of blue and green, with a central, larger particle in the middle of the page. The overall aesthetic is scientific and clinical.

COVID-19 Claims Administrative Playbook

**GENERAL
LIABILITY**

Prepared for Fairfax WorldWide

GENERAL LIABILITY

COVID-19 RELATED CLAIMS PLAYBOOK

Introduction

Wilson Elser is pleased to present this COVID-19 General Liability Playbook, which is designed to assist claims professionals navigate the previously uncharted territory of COVID-19 claims handling and litigation. This playbook is not a substitute for legal counsel, and should not be construed as the rendering of legal advice. It is for information only. Also, this playbook is not designed to be a complete claims handling manual; we have not attempted to address every claims handling issue and procedure that could arise. Many of those issues would be the same as in the handling of other general liability claims. Rather, we have provided suggestions and guidance for the unique issues that we anticipate will arise during the handling of a COVID-19 claim. Likewise, we have assumed that the coverage determination has already been completed and do not seek to address that here. We believe that steps set forth in this playbook will be the most effective and efficient way for the experienced claims professional to gear up for the new challenges presented by this unfortunate pandemic. We hope that you find it helpful, and assure you that we will continue to be here for you as this area of practice evolves and new challenges emerge.

The playbook is divided into five steps or phases. Although these phases roughly follow the progression of a claim, they are not strictly temporal; there may be situations that require an activity from a certain phase to be performed earlier or later in the process or situations that require phases to be performed concurrently.

The steps are:

STEP 1.	Preliminary Investigation & Evaluation
STEP 2.	Risk Transfer
STEP 3.	Early Resolution
STEP 4.	Claim & Litigation Management
STEP 5.	Claim Resolution

STEP 1.

Preliminary Investigation & Evaluation

Step 1 Overview: Step 1 encompasses claim intake and acknowledgment, preliminary investigation and claim evaluation. During this step, the claims professional should contact the insured to discuss the claim and begin document collection and investigation. Initial information should be reviewed and the professional should make an initial assessment and identify early resolution opportunities.

SPECIFIC ACTIVITIES:

Determine whether there are any applicable orders, statutes or directives in the relevant jurisdiction governing COVID-19 claims or suits, including recent orders or statutes granting immunity in whole or part.

- Also investigate whether there is legislation on the books in the particular jurisdiction that pre-dates the COVID-19 pandemic but was enacted pursuant to a prior public health situation (e.g., 9/11, hurricanes/floods, wildfires, etc.) which may be applicable, and which may expand or mitigate liability and exposure relative to the insured, by way of statutory presumptions, burdens of proof, immunities, etc.

Documents: Ask insured for key documents and essential claim details.

- Documents, communications, and/or directives (including orders) from national, state, local and/or civil authorities that tie claim or incident to COVID-19 (e.g., Executive Orders, Board of Health, Environmental, Regulatory, etc.).
- Insured's internal incident files regarding claim or any documents that may relate to claim (e.g., safety manuals, COVID-19 protocol / guidelines, incident reports, etc.).
- Any other internal communications that may relate to COVID-19.
- Reports (including but not limited to internal, consultant, expert, and customer complaints) re: COVID-19 exposures arising from insured location or operations.
- Reports, recommendations, advice from any service providers, experts, consultants relative to cleansing, remediation, future maintenance of workplace, job-site, premises, retail location, etc., owned, maintained and/or operated by insured.
- Policies, procedures and protocols relative to re-opening of insured's business and return to work.
- Reports re: COVID-19 and insured: e.g., infected employees, infected customers, contaminated property, government reports or directives.

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- ❑ Insured guidelines, manuals, and protocols re: COVID-19 and the workplace.
- ❑ Logs, checklists and reports relative to insured's performance (or non-performance) of implemented guidelines and protocols.
- ❑ Similar claims, demands, and lawsuits arising from or related to COVID-19 against insured.
- ❑ Similar claims, demands, and lawsuits involving claimant arising from / related to COVID-19.
- ❑ Any other document or information the insured believes may be relevant to its defense of COVID-19 claim.
- ❑ Ask insured to identify decision makers and employees with the most knowledge of liability, exposures, and risk management issues pertaining to COVID-19.
- ❑ Obtain any insured documents regarding impact of government action, civil authority orders, quarantine, shelter-in-place orders, stay-at-home directives, etc.
- ❑ Include request for any documents linking any referenced action or civil authority order to the claim and the relationship between claimant and insured.

Further collection of and evaluation of claim details.

Given the broad range of liability exposures that may fall within a general liability policy, each claim should be investigated and evaluated on its own merits. [Some basic and foundational claim background questions are attached](#). These are not a template but examples of starting points for consideration in evaluating COVID-19 claims.

Evaluate claim and defenses.

- ❑ Evaluation of claim and/or causes of action:
 - What is causation nexus between claimant's alleged exposure to or damages from COVID-19 and claimant's relationship with insured, versus possible exposure from any number of other sources.
 - Carefully consider the extent of alleged damages and potential for comparative fault defense.
 - Are there allegations of gross negligence or willful misconduct (e.g., willfully refusing to comply with stay-at home orders; proceeding with public gatherings with knowledge of prior COVID-19 exposure to some attending), and if so, do these allegations potentially negate any otherwise applicable immunity or limited liability statutes, orders or directives.
 - Perform social media research as permitted with a view toward determining claimant's conduct, attitude and practices relative to stay-at-home and social distancing.

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▣ Identify and evaluate possible defenses:

– Do any federal or state executive or legislative defenses apply?

- Immunity for health care providers, essential businesses, compliant businesses, etc. (e.g., Federal PREP Act Immunity; Immunity Statutes in North Carolina, Oklahoma, Utah, Wyoming, et al.)
- Do Executive Orders allow for a defense? (e.g., Illinois, New York, Virginia, et al.)
- Are Good Samaritan statutes applicable?
- Workers compensation exclusive remedy?

Note: Certain jurisdictions have issued orders or amended statutes to create presumptions of compensability for certain work-related COVID-19 claims (e.g., California, Illinois) whereas the law in other jurisdictions does not allow recovery for communicable diseases, except in limited circumstances (e.g., Louisiana, Nebraska, North Dakota, et al.)

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STEP 2.

Risk Transfer

Step 2 Overview: During this phase the claims professional should assess opportunities for transferring all or part of the risk to other parties or insurers. Appropriate tenders should be made and defense counsel should be instructed to pursue legal action to enforce tender rights when necessary.

SPECIFIC ACTIVITIES:

Risk transfer activities should proceed as customary in general liability cases, including identification of other parties who may have contributed to COVID-19 exposure and the tendering of defense and indemnification to such parties and their carriers as may be appropriate. Specific examples would include:

- When insuring a business or property owner accused of not disinfecting properly, the janitorial company and its carrier should be identified, contracts and certificates of insurance should be obtained, and the appropriate tenders issued.
- When insuring a retailer accused of selling a contaminated product, all parties in the chain of distribution should be identified, contracts and certificates of insurance should be obtained, and the appropriate tenders issued.
- When insuring a staffing agency accused of failing to protect its labor force, the staffing agency's client and its carrier should be identified, contracts and certificates of insurance should be obtained, and the appropriate tenders issued.
- When insuring a company whose premises have been re-purposed for use by others as a result of the pandemic, all licenses, lease agreements, other contracts and certificates of insurance should be identified and the appropriate tenders issued.

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STEP 3.

Early Resolution

Step 3 Overview: This step involves determining the claims settlement value, formulating a settlement strategy, and entering into negotiations. Mediation and arbitration should be considered, particularly in multi-party situations.

SPECIFIC ACTIVITIES:

- ❑ Early resolution should proceed as customary in general liability cases, although particular attention should be paid to having defense counsel immediately reach out to plaintiff's counsel to elicit information and details regarding alleged injuries, damages and a settlement demand. Much remains to be seen, but COVID-19 related claims may in many instances lack severity, and with a view toward Step 4 it is essential that claims are handled and disposed of efficiently, and that defense costs are not excessive and disproportionate to ultimate exposure and settlement value.
- ❑ Careful consideration should be given to the answers determined to the questions raised in Steps 1 and 2, which may indicate that a particular emphasis should be placed upon early resolution. Factors that may militate in favor of early resolution include:
 - Investigation determines that insured was not following CDC or other applicable protocols.
 - Insured never instituted any COVID-19 safety protocols of its own.
 - Investigation determines that claimant will present credible case for exposure.
 - Communications or orders from governmental authorities indicate that incident is tied to COVID-19.
 - Insured's records indicate that incident was COVID-19 related.
 - Insured's records or governmental findings indicate that there was a history of infected employees, infected customers, or contaminated property.
 - There is a history of similar COVID-19 claims against the insured.
 - There are no applicable federal or state defenses or immunities.
 - Insured has no basis to pursue contribution or indemnification claims against third parties and/or there are no other carriers who would owe the insured coverage for the incident.
 - Case is of nuisance value.
- ❑ This section may be updated as the industry obtains more data and claim experience.

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STEP 4.

Claim & Litigation Management

Step 4 Overview: As is customary, during this step the claims professional retains counsel and provides counsel with claim information and investigation. The professional should also provide litigation management guidelines, and work with counsel to develop a litigation plan and budget. The process is continued by working with counsel toward an early assessment of the impact of the information received, periodically reviewing the plan and budget, exploring opportunities for early resolution, and making sure counsel prioritizes the discovery necessary to move the case toward the preferred resolution.

SPECIFIC ACTIVITIES:

- ❑ Request defense handling in keeping with mandated or recommended social distancing principles.
- ❑ Request that defense counsel conduct witness interviews, deposition and other matters in keeping with federal, state or local mandates and CDC and public health guidelines.
- ❑ New or novel theories of liability arising in litigation should be compared with national developments and reported to the insurer.
- ❑ Defense counsel should be encouraged to have a mechanism in place for monitoring COVID-19 litigation and verdicts.
- ❑ National Coordinating COVID-19 Defense Counsel, if any, should be provided copies of all reports and consulted on key litigation decisions such as dispositive motions, resolution, and proceeding to trial.

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STEP 5.

Claim Resolution

Step 5 Overview: This step encompasses executing the litigation plan in pursuit of the preferred resolution. Upon resolution, the appropriate settlement papers should be procured, and should contain the usual releases, waivers, set-asides and indemnification.

SPECIFIC ACTIVITIES:

- ▣ Claims resolution should proceed as customary in general liability cases, including obtaining proper stipulations of discontinuance, releases, and confidentiality clauses. To date, no specific COVID-19 considerations have been identified.

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COVID-19 Claim / Litigation Background Investigation — Example Inquiries

FOUNDATIONAL QUESTIONS RE COVID-19 CLAIMS

Has any individual claimed that he or she was infected with COVID-19 as a result of visiting the loss location?

Has the insured or insured's employees tested positive for COVID-19 prior to date of loss attributed to claim?

Is there any evidence that a visitor to the loss location tested positive for COVID-19?

If the answer to the prior question is yes, was this claim investigated and what did it reveal?

What is the causal connection between the operations and the diagnosis of COVID-19 in any individual visiting the the loss location?

What is the date of any positive COVID-19 test connected to the claim? Does the test date precede the visit to loss location?

Have any governmental authorities notified claimant or the insured that the loss location has been contaminated by COVID-19?

If the answer to the prior question is yes, what was the date of notice and what information and documents can be provided?

What actions did the insured or claimant take in response to any notice of COVID-19 contamination?

Did a civil authority (local, state, or federal) ever order the insured to remediate the loss location as a result of COVID-19?

If the answer to the prior question is yes, what efforts did the insured undertake to comply with an order to remediate the loss location?

Did the insured's operations cease in total or in part due to COVID-19?

If the answer to the prior question is yes, was the closure attributed to COVID-19 contamination at the loss location, or was the closure due to a general closure order to prevent the human-to-human transmission of COVID-19?

FOUNDATIONAL QUESTIONS RE COVID-19 CLAIMS

Did the insured's operations close due to contamination at another property within one mile of the loss location? If yes, identify the address and any known details.

Identify any operations that ceased and claimant's basis for attributing the cessation to any insured operations that were ongoing, or any act or omission by the insured.

Have operations at the loss location resumed in whole or part?

Did a governmental or private entity ever inspect the loss location for contamination due to COVID-19?

If the answer to the prior question is yes, what did the inspection reveal; and what is the insured's relationship to the loss location?

Did a government authority (local, state, or federal) issue a civil authority order that closed the insured's business?

If the answer to the prior question is yes, did it apply to all similar business in the same area?

Does the insured have a copy of the order?

Provide the date of the order and any notice provided to claimant and/or insured.

What does claimant allege that ties insured's action, operations, or omission to any closure or injury arising from a civil authority order?

Did any communications or investigations precede the demand?

What were the results of any prior investigations or communications?

What is insured's reaction / defense to allegations against it?

Has the insured provided notice of claimant's COVID-19 claim to any other insurer? If so, request copies of communications.

Is there other information regarding the COVID-19 claim the insured would like to share?

BODILY INJURY CLAIMS

Does the claim include a demand for damages arising from bodily injury?

Was claimant infected with COVID-19?

Does claimant allege physical injury to his or her body with physical manifestations?

If yes, what are the injuries?

Have claimant's medical records been provided?

Does claimant allege emotional distress?

What does claimant allege that ties insured's action, operations, or omission that led to bodily injury?

Did any communications or investigations precede the demand?

What were the results of any prior investigations or communications?

Have any other individuals attributed COVID-19 infections to this loss location, or the operations or omissions of the insured?

If the answer to the prior question is yes, what other information or documents are available regarding similar claims?

What is insured's reaction / defense to allegations against it?

YOUR TEAM – CONTACT US WITH QUESTIONS

Insurance claims issues and their financial and reputational implications will persist long after the COVID-19 pandemic subsides. **Wilson Elser is ready to help you and your insureds** prepare now for the unprecedented times ahead. Drawing on vast related experience, we know how to build confidence among key stakeholders and craft defense strategies that can withstand aggressive litigation. Our attorneys are already working with several insurers to develop their COVID-19 claims response teams and with a wide variety of insureds to prepare winning defenses.

Feel free to contact the Wilson Elser attorneys listed below to begin a dialogue and determine how we can assist you.



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