

BUSINESS INTERRUPTION TOOLKIT 2020

The COVID-19 outbreak has served as notice to many companies that they need to be prepared for the possibility that their operations (including supply chains) may be disrupted, potentially for a lengthy period of time. Other events—including natural disasters and cyber-attacks—are on the rise and show no signs of slowing down. Whether you are submitting an insurance claim in connection with the current COVID-19 outbreak, or evaluating business interruption insurance as part of your company's risk management strategy going forward, this Toolkit includes several checklists companies may use to help ensure they are prepared to handle a business interruption, and basic steps they should take. Although these principles are generally applicable to all businesses, your company should consult with counsel and its risk management specialist to determine the particular steps the company should take to prepare for and react to a business interruption.

TRIAGE

Even if a company carefully plans for the possibility of a disruption in its operations, a cessation in operations will always come as a surprise. Because time will be of the essence and swift action will be necessary, the first steps the company takes after the business interruption may be the most important to its ability to recover quickly and fully. The company should consider the following initial actions:

❑ **Safety first.** Above all else ensure that your employees and customers are safe and secure.

❑ **Initial damage assessment.** Make an initial assessment of any physical damage to your company's property and the cause of the damage. The cause of the loss will be relevant to whether the company's business interruption policy covers that loss. Counsel should be involved in helping assess damages, because that involvement will aid in determining which losses are covered by insurance, and help maintain privilege for communications related to the damage assessment. Expert assistance may be needed to do a proper damage assessment.

❑ **Assemble the team.** The company's team, designated in advance of the loss, should be responsible for getting operations back up and running and seeking any available insurance recovery.

❑ **Determine whether operations can be partially resumed or fully resumed at a different location.** For some businesses, a business disruption may impact only part of the business and not cause the company to shut down completely through remote work or otherwise. For example, a hotel may be partially damaged from a storm, but otherwise able to provide services to its customers. Or a company may be able to relocate and continue its operations while its manufacturing facility or offices are repaired. These possibilities should be considered. If a company could partially resume activities and chooses not to do so, that could be used against the company if it files a business interruption insurance claim.

❑ **Consult counsel.** Contact your counsel to discuss the nature of your losses and what may be recoverable under your business interruption policy. Getting initial advice from counsel concerning what is and is not recoverable under your policy and the law may be the difference between a substantial insurance recovery and a more limited recovery because the company is not fully prepared to engage in discussions with its insurer.

❑ **Reach out to the company's insurance representative.**

Following discussions with counsel, contact your insurance broker and prepare a claim notice, as more fully discussed below. The notice should be submitted promptly and consistently with the terms of the policy.

❑ **Prepare to prove losses.** Locate and organize the information the company needs to prove the amount of its losses. This information should be maintained electronically, ideally in a location separate from the company's central operations. Losses will ordinarily include lost profits, ongoing expenses, and costs created by the disruption in the business itself (such as temporary relocation or emergency-response costs).

❑ **Initial claim submission.** Consider, along with your team, what types of initial claims the company may want to make with its insurer to ensure that ongoing expenses are paid in a timely manner while the business goes about restoring its operations. Smaller initial claims that are submitted in consultation with the insurer will be easier for the company to justify and easier for the insurer to promptly pay, in contrast with large claims the company submits once all damages from the event have been established. Appropriate reservations of rights should be made when initial claims are filed, so the filing of the first claim does not impair the ability to file subsequent, and potentially larger, claims.

THE TEAM

Typically, one person will not be able to properly handle a business interruption insurance claim that is of any significant size or complexity. Putting together a team of people who are knowledgeable about the losses and the company's profits from prior years is essential to obtaining maximum recovery. Ideally, the company should designate this team before any business interruption occurs. Candidates to consider for the team include the following:

❑ **Finance.** Whether this is the CFO or his or her designee, someone who understands the losses the company is incurring due to the business interruption must be on the team. This includes people who can value the lost profits and those who can calculate the company's expenses that continue even while its operations are paused.

❑ **Property manager.** If the interruption is such that it affects a particular location (such as a hotel or a manufacturing plant) or piece of property (such as a vessel), the person(s) with knowledge about the daily operations at that location or concerning that property should be consulted about the loss.

❑ **Risk management.** Someone involved in risk management should have insights into the risks the company anticipated, how it planned for those risks and sought to account for them, and the nature of the company's insurance coverage. This person may end up as the point person for interacting with the insurer (or with the company's counsel) for purposes of filing a claim or getting involved in any dispute.

❑ **Counsel.** In-house counsel may play a role similar to risk management in terms of filing a claim and helping ensure the claim is paid. Outside counsel will, in most cases, be called upon to advise the company during the claims process and handle any disputes. Given the nature of business interruption coverage, there will usually be questions about what is recoverable, including the potential amount of the recovery, how damages are to be calculated, what kinds of damages are compensable, and the period during which losses may be recovered.

❑ **Public adjuster.** It is common for companies to hire public adjusters to help calculate the insurance claim and see the claim through until it is paid.

❑ **Other experts.** Depending on the nature of the business interruption, the company may need to retain experts to assess the extent of the damages, the cause of the damages, and/or the financial impact of the damages on the company. For example, an economist, real estate appraiser, or engineer (or all of them) may be needed to prove a claim. But the important point is that whether or not the company recovers fully for its losses will depend not on whether it suffered a loss, but which damages it can prove. The larger the claim and the company, the more important it will be to put together a team of experts to help prove the claim.

CLAIM SUBMISSION

When it comes time for the company to file a business interruption claim, the company should follow certain best practices.

❑ **First claim.** As noted, it is better to file a small initial claim and then multiple, iterative claims thereafter than to file one large claim when all losses have been determined. Appropriate reservations of rights should be made with the first claim (and all subsequent claims) to ensure that the claim does not waive the right to make future claims. This should help the company by providing it with a periodic influx of insurance proceeds rather than having to wait until the claim is finally resolved to obtain any recovery. It will also help the insurer establish a process for reviewing the company's claims, and allow both sides to identify problems with the claim-submission process and the company's proof

early on. *Maintaining an ongoing dialog with the insurer is the best way to ensure maximum recovery from a business interruption.*

❑ **Meet the insurer's requirements.** An initial discussion with the insurer about its claim-submission requirements will avoid headaches later in the process. If the insurer uses a particular claim form, the company should use the form. If the insurer requires certain types of proof, be sure to provide what the insurer wants or be prepared to provide what the company has and explain why the insurer's usual requirements cannot be met. Running afoul of the insurer's requirements will create unnecessary difficulties during the recovery process.

❑ **Provide a reasonable initial estimate of the loss.** If possible, it will usually be helpful to estimate the total amount of the loss for the insurer. This will allow the insurer to reserve the appropriate amount for the company's loss, or it will at least provide notice that the insurer should do so. If the initial estimate is subject to change, the bases for potential changes should be laid out and appropriate caveats made about the potential for the ultimate claim amount to be larger. The company should be careful to state that the estimate is not a floor or a ceiling for the claim, but just a way for both sides to understand at an early stage what to expect from this particular claim.

❑ **Proof, proof, proof.** It should go without saying that the better the proof the company can provide to support its claim, the more likely it will be that the company recovers most or all of what it claims to have lost. Likewise, claims based on speculation are at real risk of being denied in whole or in part. There are several ways for a company to prove its lost profits and ongoing operating expenses, including proof based on prior-year sales and proof based on the performance of comparable properties. This gets complicated when the company is relatively new, has been unprofitable, or expected to expand its operations and earn more profits going forward than it made in prior years. Before submitting a claim, the company should make itself aware of these issues and seek to address any weaknesses in its proof.

❑ **Be comprehensive when measuring damages.** Under standard business interruption policies, coverage is available for lost profits and ongoing business expenses. (State laws differ as to whether a company that was not profitable may still recover its ongoing expenses.) Lost profits will be a single number calculated based on myriad factors for each company, including the aggregate of lost profits for any business lines or related entities covered by the policy. Companies will also have many different types of expenses that continue even if the business is

interrupted, including rent, salaries, utilities, and contract obligations. Its costs may also include the additional costs the business incurs as a result of the disruption, such as the cost of temporary relocation or equipment rental. Although the exact scope of the ongoing expenses for any given company cannot be covered here, the key point is that the company's team should ensure that it makes a complete claim for recovery of its ongoing expenses as well as additional expenses it incurred as a result of the event.

❑ **Be consistent with the terms of the policy.** Companies purchase differing types and amounts of business interruption coverage. Does the company have \$50,000 in coverage or \$50 million? Under the policy, how long does the company have to restore its operations before coverage ceases (called the "period of restoration")? Further, many policies provide that all losses must arise out of damage to the company's own property, but some (including contingent business interruption policies) do not. What happens if the company cannot operate because utility service in the area has been disrupted even though its property has not been damaged? Under what conditions may the company recover under a cyber policy for any cessation in its operations? These and other questions underscore the importance of making sure the company understands what coverage it has and files an insurance claim that is consistent with scope of the coverage it purchased.

No two business disruptions are alike, in their scope, the damages they cause, and the availability of insurance recovery for the loss. Nonetheless, these best practices should help any company to recover on a claim under a business interruption policy, and maximize the company's chances of prospering once its operations are resumed.

PREPARING FOR THE NEXT BUSINESS INTERRUPTION

Whether or not the company has insurance to defray losses from the coronavirus pandemic, once business has resumed, it is wise to consider how to protect the company in the event of another, future business interruption. Several questions are pertinent to this inquiry:

❑ **Does the company have business-interruption insurance?** Business interruption coverage may be part of the company's property-insurance policy, and it may be part of its cyber policy as well. If the company does not have this type of coverage, consider whether the premiums justify purchasing it in light of the risks the company may face.

❑ **If the company has business-interruption coverage, does it have enough?** Companies often do not routinely assess whether the amount of coverage they hold matches the potential losses from a disruption in operations. The coverage levels are often too low because they are outdated. If the company has business interruption coverage, determine the amount of coverage you have, and whether that remains sufficient. Frequently, companies do not increase the amount of coverage as their business grows. Annual re-evaluation of coverage is recommended.

❑ **If the company has business-interruption coverage, does it have the right kind of coverage?** Standard business interruption coverage pays for losses arising out of damage to the insured's property. But increasingly, businesses are being disrupted for reasons having nothing to do with damage to their property, including loss of utility service or the interruption in the operations of a key supplier. Insurance is available to protect against such losses. Companies should assess whether they face these kinds of risks and purchase the appropriate insurance to protect against them. Close attention should be paid to the terms, conditions, and language that govern the scope of coverage.

❑ **Develop a business-interruption plan.** Every company should maintain a plan specifying what it will do if business is interrupted and which staff members will be responsible for which aspects of the company's response. Such plan should be reviewed and updated periodically.

❑ **Know how to reach your employees and important contacts.** Maintain in a secure location contact information for all employees and key contacts, especially those who will be called upon in the event of a business disruption. This may include key executives and managers, legal counsel, and employees expected to assist (especially those who are integral to the company's business interruption plan). This should also include the insurance broker involved in the company's purchase of business interruption insurance, who may serve as a liaison with the insurer if an insurance claim needs to be filed.

❑ **Maintain evidence of prior sales, which will be needed to prove lost profits.** Make sure the company's records of prior-year sales are kept in a secure location and/or on secure servers. These records will be important to proving the amount of business losses the company will incur from a disruption in its operations. If prior-year sales data is not available, other potential sources of proof may be the profits of comparable businesses or evidence of the company's projections (especially if made prior to the loss). Acceptable types of proof will vary by jurisdiction..

❑ **Consider what else the company would seek to recover if its business is interrupted, and keep relevant documents secure.** Business losses will be company-specific. Therefore, some consideration should be given to what your particular company would lose if its business were interrupted, and adequate records should be kept to ensure these losses could be proved and recovered if a disruption did occur. For example, if the company had anticipated expansion, this plan should be documented and maintained in a secure location. Potential future profits may be difficult to prove when submitting an insurance claim, and may not be recoverable under certain states' laws. But the better the documentation and the more concrete the plans, the easier it will be to prove a claim for loss of these future profits.

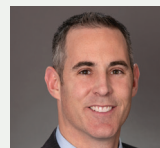
❑ **Maintain proof of continuing expenses.** Make sure the company has records of its ongoing expenses, such as lease obligations, salaries, utilities, equipment rental, and outstanding invoices. These records will be critical to ensuring that the company is able to recover insurance proceeds for such costs, which do not stop merely because the operations of the business are interrupted.

❑ **Secure the company's contracts.** Copies of all contracts that bind the company should be maintained in a secure location for easy access if the company's offices are affected, or its computers or network are compromised.

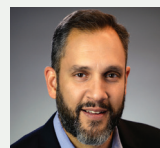
For further information concerning business-interruption insurance coverage issues, please contact:



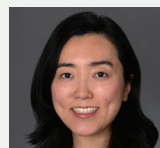
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