

# States Introduce Emergency Laws Seeking to Retroactively Expand Business Interruption Insurance for Small Businesses to Include Claims Related to COVID-19 Despite Policy Exclusions Providing Otherwise

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New Jersey, Ohio, and Massachusetts have proposed legislation to provide a means for businesses to recover losses related to the coronavirus if the business is of a certain size and had business interruption insurance at the time each state declared a state of emergency. This is despite the fact that global virus transmission and pandemic are generally excluded from the list of covered losses under most existing business interruption coverage.

## *Losses from viruses are covered losses.*

New Jersey led the charge and introduced draft New Jersey Bill A-3844. Ohio followed suit on March 24, 2020, introducing H.B. No. 589 “[t]o require insurers offering business interruption insurance to cover losses attributable to viruses and pandemics and to declare an emergency.” Massachusetts simultaneously introduced S.D. 2888 “to require certain insurance companies in the commonwealth to provide business interruption insurance coverage to their insured in connection with the COVID-

19 pandemic.”

***Notwithstanding other laws, rules, or regulations providing otherwise.***

The New Jersey and Ohio bills provide that “notwithstanding” other laws or rules, every policy of insurance insuring against loss or damage to property, including loss of use and occupancy and business interruption, shall be construed to include coverage for business interruption due to global virus transmission or pandemic. The Massachusetts bill applies “notwithstanding” other laws, rules, regulations, *or* policy language otherwise. It also expressly applies to losses directly or indirectly resulting from COVID-19, regardless of virus exclusions or lack of physical damage to the insured’s property. All three bills also seek to extend coverage for losses incurred until the states’ respective executive orders declaring a state of emergency have been rescinded, subject to any monetary limits of the policy.

***For companies of a certain size with business interruption insurance in place at the time each state declared a state of emergency.***

The New Jersey and Ohio bills apply to policies issued to insureds with 100 or fewer eligible employees in the state and that were in full force on the effective date of the bills. Both bills define “eligible employee” to mean a full-time employee who works a normal workweek of 25 hours or more. The Massachusetts bill applies to policies issued to insureds with 150 or fewer full-time employees in the commonwealth and that are in force on the effective date of the act *or* that become effective before the governor rescinds the executive order declaring a state of emergency to respond to COVID-19. The Massachusetts bill also expressly provides that the act is subject to Massachusetts General Laws chapter 176D, which requires insurance companies to deal with claims fairly and in good faith.

***Carriers may seek reimbursement for claims paid from a state fund to be fulfilled by special assessments on all business interruption carriers in the state.***

The three proposed bills also provide a means for an insurer to seek reimbursement for payments made to insureds from each of the respective states. Insurers in each state may apply to the state’s regulatory authority — the New Jersey Commissioner of Banking and Insurance, the Ohio Superintendent of Insurance, and the Massachusetts Commissioner of Insurance — for relief and reimbursement from funds collected for this purpose. Each regulatory authority is tasked with setting forth procedures governing reimbursement of such claims. Finally, each bill envisions a special assessment charged to businesses providing business interruption insurance to recover amounts paid pursuant to the bills.

***What happens if the proposed laws are passed?***

If the bills are passed as legislation, insurance carriers in these states may no longer be able to deny coverage for virus-related losses to eligible small businesses. This would be despite “virus” policy exclusions included in most policies, and despite policy language requiring direct physical loss or damaged property. Instead, small businesses might be able to collect on virus-related business losses immediately.

The New Jersey bill expressly recognizes that global virus transmission and pandemic are generally excluded from the list of covered perils under the existing standard business interruption insurance policy. The bill emphasizes, however, that the Insurance Services Office, ISO, has developed a rider to provide an insured with the option of purchasing such coverage, but to date, no state has approved the form. The novel New Jersey bill is intended to hold harmless those small businesses that had the foresight to purchase business interruption insurance for losses sustained as a result of the current health emergency, but for which no such coverage is currently offered.

Opponents of the proposed legislation question the language of the bills that not only ignores the “virus” exclusion found in existing business interruption insurance policies but also implicitly (or, in the case of Massachusetts, explicitly) reads out the requirement that there be direct physical loss or damage to covered property. Insurance carriers are likely to assert constitutional challenges that the legislation impermissibly interferes with their freedom of contract under both state and federal law.

Opponents also caution against requiring insurers to pay for losses that are clearly excluded from policies, for which premiums were not paid, and the costs for which will inevitably be spread across insurers and eventually passed along to insureds.

Stay tuned for additional updates.

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