

Greyling Brief:

Risk and Liability Considerations For Coronavirus Related Services

You want to help. We understand. Keep these considerations in mind.

Many engineering and environmental firms are being asked by their clients about issues related to the COVID-19 crisis. From consulting services such as gap assessment, protocol development, or oversight of coronavirus disinfection contractors to physical disinfection services, private businesses and government entities need help dealing with the crisis. Should your firm step in?

Before moving ahead, a key question to answer is whether your firm would be insured if you provide COVID-19 related services? The answer requires a look at how professional liability and contractor pollution liability (PL/CPL) policies work. For both design firms and environmental firms, the policies providing these coverages have multiple coverage parts, with some overlapping and some distinct terms and conditions. In addition, some operations or services may implicate Commercial General Liability (CGL) and Umbrella coverage, subject to how common pollution exclusions are interpreted.

With respect to the professional liability portion of a PL/CPL policy, the coverage applies to "liability" - damages the insured is legally obligated to pay - arising from negligent professional services (i.e. not meeting the ordinary standard of care). While the wording varies from policy to policy, the general intent is the same with the key concept being liability. There is no definition in the policy that limits liability and typically no limitation or exclusion on liability arising from providing professional services in connection with a virus.

Of course other policy terms need to be considered. For example, the vast majority of professional policies only cover liability arising from "Professional Services" which are normally defined to include architecture, engineering and technical consulting. Some insurers provide broader definitions of Professional Services than others. And all policies have exclusions—there is generally no coverage for liability assumed under contract, warranties, guaranties, and losses covered by other policies such as workers' compensation or auto liability.

What if my firm wants to help with supply issues?

Some firms with 3D printers are thinking about printing respirator masks or at least certain parts of masks. There is a process to submit your manufacturing capacity through a non-profit organization to connect with the FDA, VA, and NIH using previously approved 3D designs under the Emergency Use Authorization (EUA).

[Visit here to learn more about this process](#)

Of course there are significant product liability and patent infringement issues to consider. We suggest you talk to your Greyling representative for advice.

Typically none of the above exclude or narrow coverage for liability related to a virus (although some insurers may look to add virus exclusions in the coming renewal cycles, so firms must guard against a future narrowing of coverage).

If your firm is performing a professional service that is otherwise covered by the policy, then the fact that the service relates to a virus should not affect coverage. We still recommend though that you advise your insurer about any new virus-related services your firm may provide. It's fair to assume that no underwriter anticipated the current circumstances. This raises the question of whether some PL insurers could try to deny coverage on the basis that virus consulting/engineering services are outside the definition of Professional Services or even perhaps represent a material misrepresentation.

The other component of a PL/CPL policy to consider is "Contractors Pollution Liability (CPL)," sometimes called "Pollution Liability." This part of the policy is normally only intended for non-professional services, such as "contracting activities." With respect to COVID-19, this could include physical disinfection—either by your firm's employees or via a subcontractor to your firm. For environmental firms that normally perform construction work such as site remediation, this is a reasonably well understood coverage part. For design firms that normally only provide consulting services, CPL often does not apply.

The key difference between the PL coverage part and the CPL coverage part is the range of liabilities covered. The CPL coverage part covers liability arising from a specific event or condition caused by "pollution,"

a defined term, while the PL part, as noted above, covers "liability" arising from negligently performed "services." The typical definition of "pollution" is generally broad and often includes the word "irritant" but rarely includes the word "virus." In the absence of certainty, if you plan to perform (or subcontract) any contracting work related to COVID-19, ask your insurance broker to look into whether or not the underwriter will endorse the policy to affirmatively add "virus" to the CPL coverage definition of "pollution" (or equivalent definitions, as appropriate). *For more in depth information on CPL exposures and coverage, please see our separate brief on this topic.*

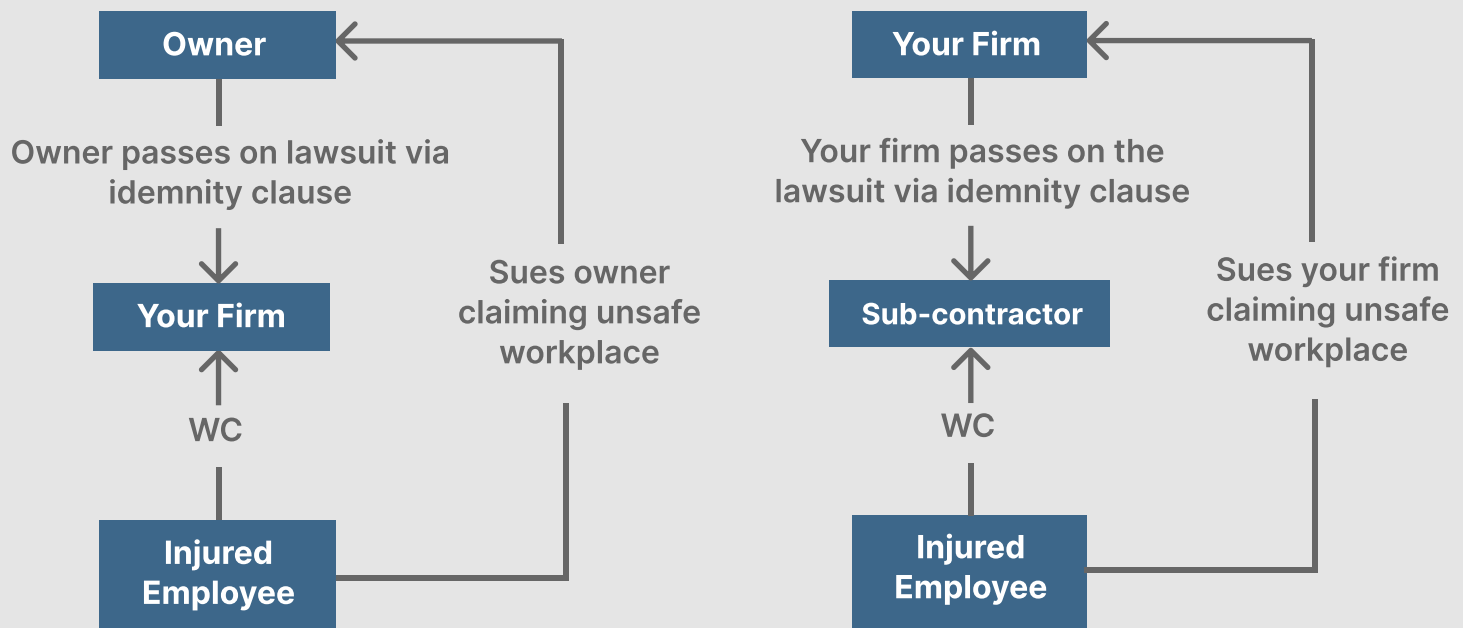
NOTE: A limited number of insurers that focus on PL/CPL coverage for environmental firms do include the word "virus" in their definition of "pollutants." At least from the perspective of these insurers it is an insurable exposure.

Another coverage to consider is your CGL policy (and umbrella/excess). A typical CGL policy and umbrella or excess policy will have a pollution exclusion. The pollution exclusion will read similar to the definition of covered "pollution" in a CPL policy. The intent is that a CPL policy covers what a CGL policy excludes. The problem is that the definition of pollution excluded in a CGL policy includes the word "irritant" and does not include the word "virus" resulting in uncertainty. In a few states there is case law on bacteria-related liability (some consider it covered, most do not), but in most states there is no precedent. The answer, as with the PL/CPL coverage, is to discuss the coverage with your broker and communicate with your underwriter before a loss occurs to understand intent. And if a loss occurs, then all three coverages, PL, CPL and CGL (and umbrella/excess) need to be evaluated.

One final issue to consider is what if one of your employees—or the employee of a subcontractor—contracts COVID-19 while working on a COVID-19 related project? (Note that protection of employees, use of personal protective equipment, and meeting various CDC, OSHA, or project-specific requirements is beyond the scope of this Brief.) Setting aside the issue of proving where the employee became ill, if a state Workers' Compensation Board deems the disease to be a result of employment and contracted in the course of employment, workers' compensation policies will provide coverage—both for medical costs and lost wages (in accordance with state rules).

Under the workers' compensation system, an injured employee cannot sue their employer. But they can sue other parties—owner, general contractor, prime engineer, etc.—and when someone is injured badly enough, this often happens. Assuming typical indemnity clauses, this liability may flow back to the firm that hired the injured employee. It is known as a third-party action-over claim. See examples below.

Third-Party Action-Over Claim Examples



When your firm faces a third-party action-over claim from the owner due to your injured employee, your PL/CPL policy needs to provide the right coverage. For most non-environmental design firms, the insurance companies for PL/CPL coverage are not comfortable with this exposure and will not cover it, especially for smaller firms. There are exceptions of course. And for environmental firms, the policy forms more often have the proper wording, but not always. If you pursue this type of work, before starting you need to speak with your insurance broker to determine if you have or can obtain the proper coverage for action-over claims.

And if an employee of a subcontractor working for you is hurt and sues your firm, ideally the following things are in place:

- Your firm is named as additional insured on your subcontractor's general liability policy and the CPL portion of their PL/CPL policy.
- The contract between your firm and your subcontractor requires them to defend and indemnify your firm due to losses arising from their work.
- Your subcontractor has confirmed that their general liability policy and their PL/CPL policies do not have any exclusions for a third-party action-over claim and in fact do have coverage for third-party action-over claims.
- Your subcontractor has confirmed that their CPL (or CGL) policy will provide coverage for loss due to a virus.

There are many factors—legal, risk management, experience, etc.—to consider when deciding whether or not to pursue COVID-19 work or services. If your firm is thinking about moving ahead, please reach out to a Greyling representative for advice.

We are all in this together.
And your Greyling Team is here to help.

Please contact us with any questions

EMAIL: info@greyling.com | **PHONE:** 770.552.4225 | **WEBSITE:** www.greyling.com

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