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Public and Private Recovery of COVID-19 Financial Losses and for Supporting New Safety Requirements

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The ability for public and private school systems to recover from operational interruption losses is complex and evolving. We sought professional legal counsel to review general perspectives toward securing damages through submitting an insurance claim for “business or operational interruption losses.” Having worked on school health and policy issues for many years, we have taken the liberty as health policy professionals, to comment on what we think makes sense at this point, for schools confronting COVID-19 and regulatory-based losses and necessary public health expenditures.

WE ARE AWARE OF SEVERAL SITUATIONS NATIONALLY where institutions that can document COVID-19 operational loss have challenged business insurance providers that have denied documented claims for damages. In a number of states there is proposed legislation mandating that private insurance carriers cover COVID-19-related losses, regardless of policy exemptions. At this point, courts have dismissed most of the cases in civil law, but allowed one (a hair salon) which did not have a specific exemption for viruses to proceed. None of the state proposed legislation mandating insurance coverage for schools has been passed as of January 2022. School reimbursement through operational interruption insurance is an unknown, but if the policy did not specifically exempt damage resulting from a virus, some law firms are guardedly confident regarding eventual recovery.

Even with a standard virus exclusion, some law firms believe a case for recovery might be possible and may trigger the possibility of public financial contribution for documented operations interruption damages in conjunction with private insurance contribution.

Over the last 40 years we have worked with schools and school districts to recover costs associated with mold, carbon monoxide, E coli, ammonia, indoor air quality, and especially asbestos. In each of these situations, reimbursement to the schools hinged on documenting loss and the characteristics of public health-sensitive, cost-related responses. The evaluative criteria typically used in private insurance claims was the basis for recovery and contributed toward successful requests for public support. The commonality was always that any eventual restitution took a long time.

Public Support

Virtually all federal, state, and local revenue agencies have formally discussed financial support directed toward schools that have suffered financially through publicly mandated closures and closures for necessary, new health and safety expenditures. This public reimbursement remedy is also an unknown; however, in all past cases it was important that losses be archived.

Serious consideration should be given, with input from in-house legal counsel, to filing a private insurance claim. In the case of asbestos there was substantial reimbursement to school districts through public bonding and in conjunction with private insurance, following federally mandated consolidation of claims. This consolidation of claims is being proposed federally for COVID-19-19 losses. Reimbursement typically has been contingent on both documentation of the characteristics of loss and expenses related to implement health and safety guidelines.

What Should a School District or School Do?

Most importantly, recognize that there is tremendous concern and public comprehension of the emotional and financial burdens on educational institutions. It would seem possible, perhaps probable, given the public importance of education to the community that there will be financial remedy in some form. Whether it comes from a sympathetic and sensitive judiciary or jury or state or federal financial remedy, there will be help and support. It will be helpful if the characteristics of the financial loss and cost associated with recovery are recorded. As time passes, that documentation will become more difficult.

The following is a list of approaches for archiving loss, created by Christopher H. Yeka with the legal firm of Larkin Hoffman, which would complement what is necessary for an insurance claim and also for documenting loss for potential public reimbursement:

- ✓ Business operational interruption losses are calculated based upon the language of the individual policy, which can vary. However, generally, business interruption is based on the time loss multiplied by the quantity of what is lost (whether it be goods or services) multiplied by the value of the goods or services. Time x Quantity x Value. To maximize their claim, the policyholder should strive to keep records so that they can quantify all three of these variables. Most policies also include coverage for “extra expense” incurred that is unique to the event.
- ✓ With respect to the time element, it is important to keep records of when the business or operation was closed or adjusted.
- ✓ In the instance of COVID-19, retain copies of any state or local mandates, along with any internal decisions to close down or change the nature of operations.
- ✓ For quantity, keep financial statements, records, balance sheets, cash receipts and out flow, both for the year or two before the event, and during the event. If you have key reports, maintain them and keep all of the supporting documentation and receipts.
- ✓ For value, maintain records of employee and staff time for the year or two **before** the event, and then **during** [the event] so that you can show if the numbers and productivity have been impacted. Keep time sheets, and pay records for staff, including any overtime.
- ✓ For extra expense, if you have specific costs associated with dealing with COVID-19, maintain those because most policies contain a provision that provides coverage for “extra expense.”

Some school administrators have expressed concern that submitting an insurance claim would cause their carriers to raise rates. That simply should not be the case and would likely be frowned upon by the state insurance regulators. First, if the claim is denied, there is no obvious justifiable reason to raise rates. In most states, unfair claims practices acts forbid an insurer to threaten cancellation or nonrenewal to resolve a claim or potential claim. Regardless, school administration may want to explain to the insurance agent or carrier that they have been advised by their in-house legal counsel to submit the claim understanding that it may be initially denied.

The nature of public reimbursement is unknown, but having archived COVID-19 expenditures and recording necessary costs associated with safely reopening may be an important element in securing reimbursement.