



## COVERAGE QUESTIONS

# Business Insurance Implications for Coronavirus

**C**ORONAVIRUS is forcing US businesses to face a number of insurance implications, and you maybe wondering if any of your policies will pay for claims resulting from the outbreak.

The main lines of insurance that may come into play are:

- Business interruption coverage
- Workers' compensation insurance

But as always, insurance policies are specific in what they will cover. That's why we are providing you with this explainer.

### Workers' compensation

The key requirement for a compensable workers' compensation claim is that the injury or illness arose "out of or in the course of employment."

That wording makes it difficult for most workers to file a claim if they suspect that they got the virus at work, presumably from another employee or a customer.

Under state workers' compensation law communicable diseases are typically considered non-compensable since it would be difficult to prove if an employee contracted the disease at work or in another setting altogether.

A coronavirus claim could be compensable in the following situations:

- Anybody working in a setting where there are patients being treated and tested for the coronavirus would have a strong claim if they contracted the virus. This would include clinics, doctor's offices and hospitals.
- Personnel who have traveled abroad on business and upon return discover that they have fallen ill and contracted COVID-19. They could file a workers' comp claim since they likely caught it while on the trip, which would technically be "arising out of or in the course of employment."

State laws governing workers' compensation insurance limit how a policy can apply coverage to employees outside the U.S. If you have employees that are traveling extensively or are working on assignment abroad, you may find they are not covered by your workers' comp policy.

### Business interruption

Business interruption coverage replaces income that was lost due to a disaster, such as a fire on the premises of the company or one of its suppliers, or a hurricane that hinders a company from operating.

It is a common coverage on a business owner's policy or commercial property policy. But in this case, it's unlikely the policy would respond to a business interruption claim.

Most policies require that there be direct physical loss or damage to either your premises or some part of your supply chain in order to trigger business interruption coverage.

Without that trigger, insurers would likely argue that a virus in your facility is not physical loss or damage. ❖



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## IRS ORDER

# HDHPs Can Pay for COVID-19 Testing, Treatment

**T**HE IRS has issued new emergency guidance that allows employers and insurers to waive the cost of coronavirus testing and treatment for workers who are enrolled in high-deductible health plans (HDHPs).

Major health insurers reported that employers had been asking if they could make the change to their high-deductible plans without breaching IRS regulations regarding such plans.

Employers were concerned that free testing would technically prevent organizations and employees from contributing to linked health savings accounts (HSAs) on a pre-tax basis.

Specifically, the new guidance states that HDHPs with attached HSAs will not lose their plan status if they provide medical care services and items related to coronavirus testing or treatment even before an enrollee has met their deductible.

While the regulation does not require HDHPs to cover the testing and treatment without any out-of-pocket expenses by the enrollee, the plans can do so – and without breaching the rules regarding these plans.

The new rule could also pave the way for non-HDHPs like PPOs and HMOs to also provide coronavirus testing without out-of-pocket costs for their participants.

While there is no rule preventing them from doing so now, many of the country's large PPOs and HMOs have been reluctant to start offering free testing until they know how HSA plans would be affected.

Typically, enrollees in HDHPs with an attached HSA are required to pay all of their medicinal costs up to their deductible before the insurer will pay.

The Trump administration earlier issued another rule that allows HDHPs to foot the bill for certain preventative health services, such as vaccines and screenings for specific conditions like diabetes and high blood pressure, before the deductible is met.

In 2018, 23% of employees enrolled in employer-sponsored health insurance plans were enrolled in an HDHP with an HSA. The 2020 minimum annual deductible is \$1,400 for self-only HDHP coverage, and \$2,800 for family HDHP coverage.

The notice only applies to coronavirus and does not void any other requirements governing HDHPs and HSAs.

It states that “Individuals participating in HDHPs or any other type of health plan should consult their particular health plan regarding the health benefits for testing and treatment of COVID-19 provided by the plan, including the potential application of any deductible or cost sharing.”

The decision came after the American Benefits Council, which includes many of the largest corporations in the country, sent a letter to the Treasury Department asking it to confirm that HDHPs could cover COVID-19 testing and treatment without enrollees first having to meet their deductibles. ❖



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## MEDICAL MARIJUANA

# More Firms Sued for Discrimination

**M**ORE AND more companies are being sued for discrimination by job applicants who have legally been prescribed medical marijuana, after they failed pre-employment drug screenings or because of their use of the substance.

The issue of medical marijuana is difficult in terms of the employment picture, especially now that 33 states and the District of Columbia have legalized its use.

Of those states, 16 provide workplace protections, either through their own law or case law since their medical marijuana laws were enacted. California does not.

To confuse the issue further, marijuana is still illegal under federal statutes, putting employers in a difficult position when they are deciding whether to hire someone who uses it for medicinal purposes.

Courts are increasingly siding with workers and job applicants who are using medical marijuana when they sue employers for discrimination.

Most recently, in November 2019, the Court of Common Pleas of Lackawanna County in Scranton, PA ruled that while the state's medical marijuana law does not explicitly permit a private right of action by an employee who is allegedly discriminated against because of medical marijuana use, it does so implicitly.

There have been similar rulings in federal and state courts, including in Arizona, Connecticut, Delaware, Massachusetts, New Jersey and Rhode Island. Legal experts say the Pennsylvania case and the others have opened the door for people in other states filing similar actions.

More and more courts have therefore been willing to treat workers who use medical marijuana in the same way as those who have to take other prescription drugs.

## Litigation pathways

There are two avenues for litigation for workers who use medical marijuana, if their employers take adverse actions against them:

- **Discrimination** – Claiming medical marijuana as a “reasonable accommodation” for someone’s disability under the Americans with Disabilities Act (or a comparable state law), and that the employer should accommodate the worker’s use.

Courts have usually drawn the line at using at work to define reasonable accommodation. In other words, it would not be discrimination if an employer bars medical marijuana-using employees from using at work, but it would if they bar them from using during non-working hours.

- **Protection from adverse actions** – This could include firing, demotions or similar actions against someone who uses medical marijuana off the clock and does not come to work impaired.

## What you can do

Experts recommend that employers make an effort to engage in an interactive process with workers in states where medical marijuana has been legalized.

They recommend engaging any workers who have been prescribed medical marijuana in the interactive process, as prescribed by the ADA. Through this process, the employer can see if they have an underlying disability that requires accommodation.

One of the key considerations for employers is that the reasonable accommodation should affect a worker’s ability to safely perform their job.

If you are in a state whose laws protect medical marijuana users from adverse employment actions, you should review your policies and workplace rules to make sure they are in line with the law.

In addition, since other states have been starting to side with workers in discrimination cases, if you are in a state with legalized medical marijuana, you may want to conduct the same internal review.

If you do conduct drug testing, you should consider which positions you want to test for. Many employers have started only testing for positions that are safety-sensitive, such as those that include operating heavy machinery. ❖



## CANNABIS SECTOR

# Fraud, Corruption, Cyber Attacks Plague Industry

**T**HE CANNABIS industry is coming under increasing scrutiny as law enforcement and regulators grow concerned about criminal activity, fraud and corruption and as hackers target businesses in this emerging industry.

The FBI last year announced that it was seeing increased fraudulent activity and bribery of public officials and the U.S. Securities and Exchange Commission issued a similar call, warning about Ponzi schemes and other types of securities fraud.

Meanwhile, the industry is also being targeted by cyber criminals, who are looking to exploit weaknesses in the cyber security of cannabis-related businesses.

Below is wrap-up of what's ailing the industry.

### Corruption

In August 2019, the FBI released a podcast on fraud in the cannabis industry, outlining its ongoing efforts to root out corruption in the cannabis trade, particularly as it relates to bribing government officials for licenses, and urged public cooperation in rooting out corruption.

On the podcast, FBI spokeswoman Mollie Halpern said: "As an increasing number of states change their marijuana legislation, the FBI is seeing a public corruption threat emerge in the expanding cannabis industry. States require licenses to grow and sell the drug, opening the possibility for public officials to become susceptible to bribes in exchange for those licenses."

Late last year, the *Sacramento Bee* reported that the FBI was investigating whether Sacramento-area marijuana businesses had made payoffs to public officials in the region in exchange for favorable treatment and license approval.

And in March of last year, the Sheriff of Siskiyou County called the FBI after he received envelopes stuffed with thousands of dollars in cash from a mystery stranger who had asked him to keep deputies away from some illegal cannabis farms. The FBI investigated and eventually arrested and charge two men for attempting to bribe the elected sheriff.

Before that, in 2013, the then-mayor of the city of Cudahy was sentenced to a year in federal prison for taking bribes in exchange for supporting the opening of a medical marijuana shop in the city.

### Securities fraud

In 2018, the SEC Office of Investor Education and Advocacy warned investors about false promises of high returns with low risks for investment schemes involving marijuana-related companies.

One of the most high-profile cases that the SEC pursued involved a Colorado stock promoter who was investigated for fraud. He and two of his companies agreed to pay \$4.2 million in December 2019 to settle the charges for fraudulently promoting and trading a cannabis stock.

And in January, the SEC filed a lawsuit against a California and a Washington man, accusing them of operating a pyramid scheme that raised \$4.85 million to fund a licensed Washington cannabis business that didn't exist.

### Cyber attacks

In its 2020 Data Breach Industry Forecast report Experian predicted that cannabis retailers could become prime targets for cyber criminals since they may not fully invest in protective cyber security measures. "While any retailer is always a target for cyber criminals, cannabis retailers present a bigger target due to the nature of their business," Experian wrote.

In January, there was a significant data breach involving software that is widely used by cannabis dispensaries. The breach involved an unsecured and unencrypted database containing approximately 85,000 files that included sensitive medical data and was left exposed to anyone who came across it on the internet.

Data of about 30,000 people was exposed in that hack on THSuite, a cannabis point-of-sale provider, including photo IDs, addresses and protected health information.

### The takeaway

The FBI attributes the illicit activity to the fact that cannabis is a new industry, which makes it ripe for abuse by fraudsters as well as bribery by unscrupulous business owners trying to receive approval to operate.

Likewise, as the industry is in its infancy, companies are typically small and do not have resources to protect against hackers and cyber attacks. ❖