



# COVID-19: Immediate considerations for your insurance arrangements

These are unprecedented times. Much of what we face is becoming clearer while other issues may yet emerge.

While this is true, your insurances are there to respond to the unexpected and unknown. There are many insurance policies that are potentially responsive to claims and losses arising directly or indirectly from COVID-19 related impacts, and they should be reviewed now. This includes mapping terms that are relevant to accessing cover.

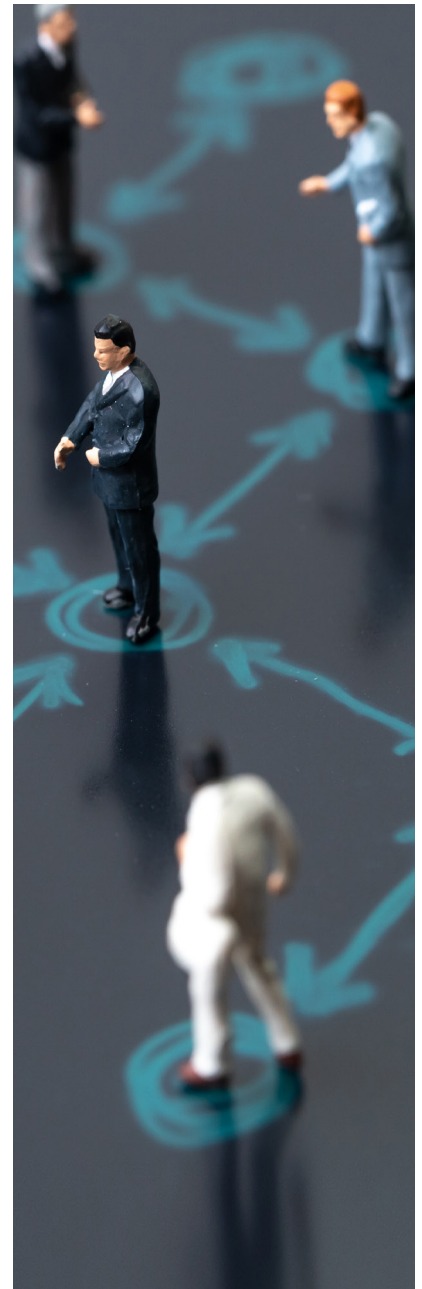
When fighting any type of crisis it is easy to forget or overlook some of the basic rules on how to access and use your insurance, whereas this should be an integral part of contingency and incident response plans.

This high-level guide from Marsh and Herbert Smith Freehills covers some of the insurance issues to consider from the midst of the firestorm.

The key point is to check the policy wording and all endorsements if you have any concerns and to engage with your broker, legal advisers and insurers early. When working with Marsh (and your legal advisers) to agree which policies may respond, it will very much depend on the factual matrix and policy wordings. Insurance cover for the same scenario may exist under a wide range of insurances – for example, property damage, business interruption, event cancellation, trade credit, political risk, Directors & Officers, professional indemnity, cyber,

employment practices liability, employers' liability, environmental liability, public liability or product liability.

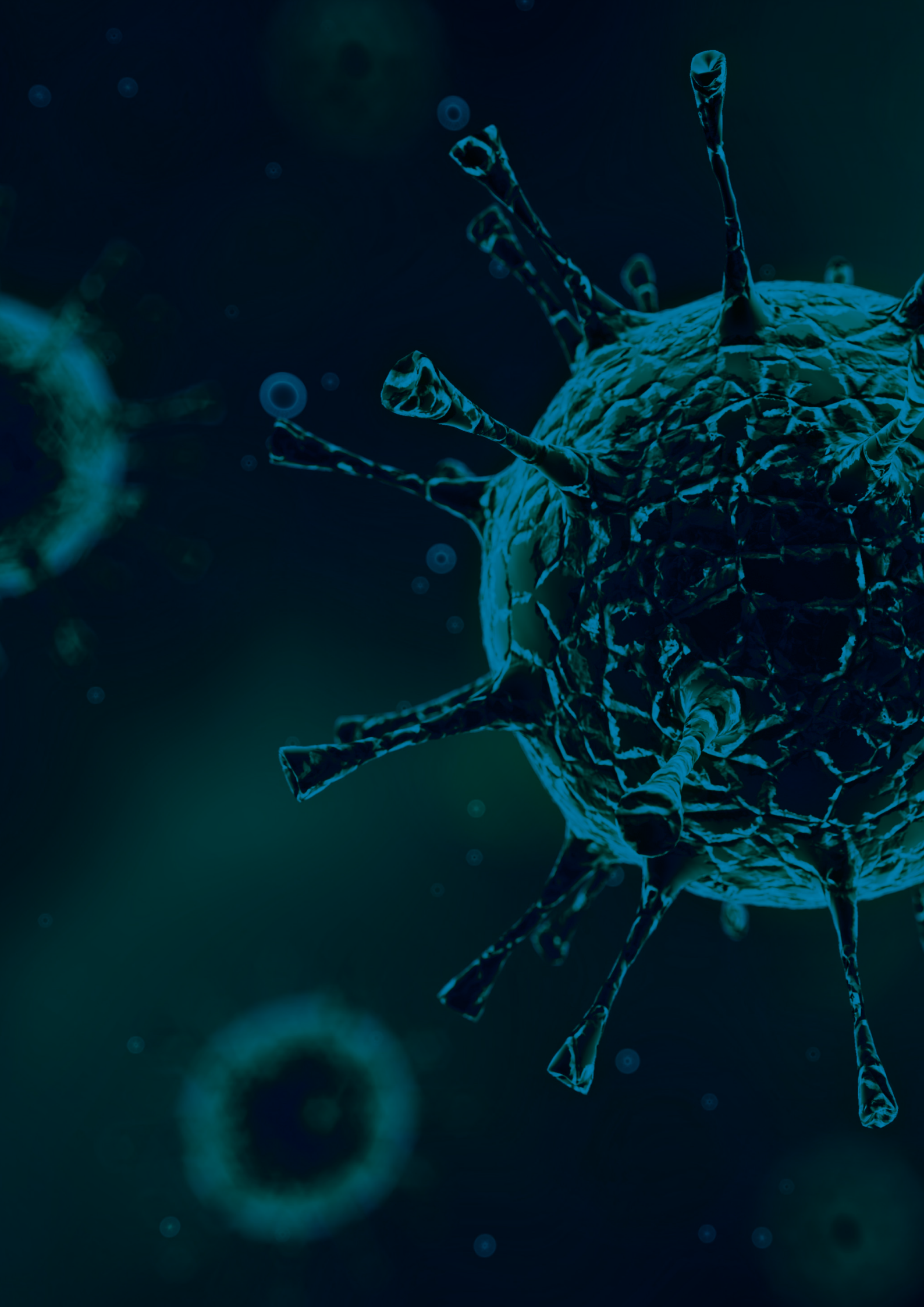
Although there are issues common to all types of insurance (such as notification), insurers' coverage positions will depend on the type of insurance and the policy wordings. For example, force majeure is an issue in construction contracts and in any subsequent contractor disputes. In business interruption claims on property policies, the potential areas of cover may include physical damage, denial of access, a notifiable disease or loss of attraction: it all depends on the particular policy wording.



	<b>Practical considerations</b>	<b>Legal perspective</b>
<b>Your policy</b>		
Policy due to expire?	<p>Engage with your broker and insurer ASAP. At the time of publication, the insurance market is working remotely, but as normal, although some matters are taking slightly longer.</p> <p>Consider if you need to seek an extension to the period of insurance if renewal on acceptable terms cannot be achieved in time or if insurers impose new exclusions relating to COVID-19.</p> <p>If you are not able to obtain all required renewal information, for example from remote or unattended sites, make this clear in the renewal and agree how you will deal with the point with insurers.</p>	<p>An extension is a contract variation. In a non-consumer contract, this triggers the need to make a new fair presentation of the risk to the extent relevant to the proposed variation. Make sure that this is dealt with in the extension wording or, alternatively, that the insurer has otherwise waived the requirement or engaged with you in relation what is and is not expected in the circumstances.</p>
Record keeping	<p>With systems potentially impacted, it is possible that discussions and agreements including with insurers are not recorded in the usual way: make sure that everything material is recorded in writing, even if that is by way of a follow-up e-mail or other communication.</p>	<p>Disputes commonly turn on contemporaneous evidence of what was discussed or agreed. Events are moving quickly and even two or more well-intentioned people may have different recollections of what was said or agreed between them further down the line. Good record keeping, including during a crisis, is crucial. Also consider noting the facts known at the time and the decision or agreement reached based on those facts. (And don't forget legal privilege, as discussed below).</p>
Mid-term changes	<p>If your risk changes mid-term, or you need an amendment for any other reason, then as always engage early with your broker. If you cannot provide full details, disclose this and agree how this information gap will be dealt with.</p>	<p>The legal impact of COVID-19 developments on the insured risk would need to be considered on a case by case basis. If in doubt, seek legal advice.</p>
<b>Complying with policy terms</b>		
Claims and event notifications	<p>It is important to comply with any policy deadlines for notifications of claims, losses or circumstances.</p> <p>Often the nature and extent of the loss is unclear at the outset so consider notifying all layers of all possible policies.</p> <p>Many policies require notification when an individual or group of staff become aware – e.g. the legal or risk team. Make sure that communications channels between your different departments remain fluid despite the logistical disruption of Government restrictions and remote working necessitated by COVID-19, that systems are stress tested and staff know who to contact if something goes wrong: with alternative escalation routes for example if the risk manager or other key figures are incapacitated or unavailable. Inform insurers of any alternative arrangements on notification.</p>	<p>If in any doubt, notify – it is common for insureds to notify multiple policies and there is no legal reason not to do so. The issue of which policies respond can be resolved once the full facts are known. On the other hand, an issue over the validity or timeliness of a notification may prejudice coverage.</p>



	<b>Practical considerations</b>	<b>Legal perspective</b>
Claims conditions	<p>Policies can have a number of claims conditions, from seeking permissions to timing and deadlines. Normally breach of these will not invalidate coverage for the claims but it is worth checking and making sure that they are in your remote diary, if different from your office one. Discuss with your broker or legal advisers if in doubt.</p>	<p>Continue to comply with all policy claims conditions to the extent possible. The legal implications of an alleged breach may vary. Seek advice from your broker or legal adviser early if compliance is an issue in order to explore whether the obligation can be amended or waived, and to understand the potential implications of any breach.</p>
Premium payment warranties (PPW) and staged payments.	<p>On Marsh led insurances, most PPW's are now "soft": if there is a breach then insurers have to give notice. Conversely a hard PPW means cover ends on the day the premium payment is missed. If you cannot pay for any reason, speak to your usual Marsh contact. Marsh is using premium-funding solutions for clients with cash flow challenges.</p>	<p>If contractual performance of a PPW obligation is prevented or delayed by matters related to COVID-2019, ideally agree a deferral of the obligation with the insurer. If that is not possible, legal relief may be available. Seek advice early.</p>
General policy terms	<p>Other policy terms may exist, from needing to notify insurers if premises are vacant for an extended period through to taking steps to preserve recoveries against third parties. These should be flagged and brought out into any relevant crisis and business planning discussions.</p>	<p>As above, continue to comply with all obligations to the extent possible. Policy obligations need to be identified and raised with decision makers early, as they may have to be balanced by the business with wider legal or practical considerations in deciding quickly on the right course of action.</p>



	<b>Practical considerations</b>	<b>Legal perspective</b>
Claims (and notifications before renewal) – proactivity	You should be proactively considering whether there is a potential claim under any of your insurances and notifying those claims ASAP. Speak to your usual Marsh contact about the scope of cover if there are any concerns.	At renewal insurers may impose (and in many cases are already imposing) new exclusions relating to COVID-19 and it is therefore vital that all claims, losses, circumstances or other notifiable events are validly notified to the expiring policy before renewal. Care should be taken to maximise the scope of what is attached to the policy by the notification. For example, notification of a circumstance involves identifying what the insured knows, balancing the scope of the notification (which can encompass a problem potentially giving rise to a hornet’s nest of issues, but too broad a notification may fail for ambiguity) and careful compliance with the policy requirements (i.e. do what it says on the tin).
Producing and protecting information	If there is a dispute (insured or not) then access to those records is vital. Make sure that your crisis planning maintains the corporate records, preserves evidence and takes account of legal privilege.	<p>Although your organisation is now working in a different way, be that remotely, from Business Continuity Plan sites or otherwise, proper record keeping is required both regulatory reasons (in the case of regulated entities) and potentially for legal reasons (e.g. if litigation is in prospect). In any event, evidence should be preserved to assess, make or defend claims.</p> <p>Be mindful also of the need to make sure that any documents or communications produced are legally privileged where possible and seek advice if in doubt. Privilege is relatively narrow under English law. Unless litigation is in reasonable prospect (which it may not be in the early stages of a crisis event), the key protection is legal advice privilege. This applies only to lawyer/client communications for the dominant purpose of giving/obtaining legal advice (and the definition of client is quite narrowly drawn). Therefore, in respect of matters that might result in regulatory action or litigation, encouraging employees to avoid speculation (e.g. on WhatsApp or email) about issues and involving lawyers (internally or externally) in communications will be important.</p>
Be careful what is said in a crisis or changed environment	There may be a temptation with the change in working environment for employees to say or record things that they would not in the office. It is important for businesses to make sure that commentary on matters to which the outcome of an underlying claim or policy coverage may be sensitive (e.g. to whether an insuring clause engages or an exclusion applies) is regulated and controlled in accordance with existing good practice.	Documents which are not legally privileged or in respect of which privilege is lost or waived may be disclosable in a coverage dispute or underlying claim.

	<b>Practical considerations</b>	<b>Legal perspective</b>
Managing risks in times of crisis	While simply carrying on business may be a challenge in these unprecedented times, good risk management is more important than ever. Directors need to make sure that basic corporate systems are maintained (e.g. remote working staff should only operate on company systems and not forward material to personal email accounts, an obvious security risk). Where necessary, systems have to be adapted to current conditions to make sure good corporate governance and communication both at Board level and through the company. It is essential that workers at home should not feel isolated or “unseen” which has the potential to lead to professional liability risks; managers still need to manage and work quality still has to be maintained.	When this pandemic passes, there is likely to be a surge in claims to recover insured losses. Many insurance policies are potentially responsive to these claims. The courts will still expect directors and professionals to have complied with their legal duties, including of reasonable care. COVID-19 will not dis-apply the requirement for normal good practices in respect of matters within that person’s control.
<b>Mitigating insurable risks</b>		
Insolvency events	Unfortunately, these are already occurring and may impact insureds or their supply chain. Extraordinary steps taken in the final days of a company can come back to haunt the directors or officers – who at the time were just doing their very best to make sure the company survives and staff are paid. If an insolvency event could happen then make sure that your advisers are aware of the insurances that you have in place, and any policy requirements that must be met.	When insolvency might be on the horizon, and particularly when the directors know or should know that the company is or is likely to become insolvent, it is vital that the board understands whether it owes duties to members or creditors (or both). Obtain early advice to make sure that risks are taken into account. Careful attention should be paid to any temporary changes to certain insolvency provisions, including proposals announced by BEIS (but not yet effective) on 28 March 2020.
Business Interruption (BI) insurance	This document is not intended to address coverage issues on specific lines of insurance, however due to a significant level of press comment about business interruption coverage, you may wish to look at the Marsh Coronavirus hub for guidance. If you would like your BI insurance requirements reviewed please contact the relevant Marsh team.	Record keeping is particularly important to maximising the prospects of a claim for business interruption. Gathering and securing data will be key, otherwise it may be more difficult to find and collate that information when the time comes. You could, for example, keep relevant evidence in a dedicated folder so that it can be readily retrieved. Full documentation on each item of loss will smooth the adjustment of your claim.
Employment and staffing issues	COVID-19 driven staff reductions are already taking place, and individuals on zero hour contracts are being stood down. The required employment law processes and procedures have not changed: make sure that they are followed and evidenced.	A range of employment law and health and safety issues may arise. For example only, the business needs to be prepared to deal with issues such as home working, caring for dependents, compassionate leave and sick pay through payroll.
Cyber security challenges	We are already seeing an increase in cybercrime. Cyber insurance cover is already one of the most important corporate protections and in light of COVID-19 it is important to consider how to use it, whether to protect against network interruptions or criminals taking advantage of weakened systems and increased on-line activity.	The General Data Protection Regulations (GDPR) continues to apply and should be followed. The Information Commissioner’s Office has issued brief guidance reminding organisations of this, but providing reassurance that a practical approach will be taken to enforcement in the event of any non-compliance.



If you have any queries or concerns regarding your insurance arrangements or needs, please contact the relevant Marsh team: we are here to help you. If you would like to discuss any legal issues with Herbert Smith Freehills, please contact:

DAVID NAYLER LLB (Hons), Dip Law.  
Financial Institutions Industry Practice Leader UK & Ireland  
t: +44 (0) 207 357 2404  
david.nayler@marsh.com

GREIG ANDERSON  
E greig.anderson@hsf.com  
T +44 (0) 207 466 2229 or

PAUL LEWIS  
E paul.lewis@hsf.com  
T +44 (0) 207 466 2138



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