GRAHAM COMPANY

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COVID-19: BUSINESS INTERRUPTION COVERAGE – LEGISLATIVE UPDATE

State Proposed Legislation: The latest attempt to force insurance carriers to provide retroactive Business Interruption Coverage for COVID-19 related losses stalled on May 5, 2020, when the District of Columbia's City Council opted to delay any vote on the proposal, after several members raised concerns about its legality and the cost such a proposal would have on insurers. Since the pandemic began, seven states have introduced similar laws that would provide Business Interruption Coverage to policyholders for coronavirus shutdowns, despite the lack of physical damage to property and specifically overriding any virus exclusion contained in the policy. New Jersey was the first to introduce a bill in mid-March and, since that time, Massachusetts, Michigan, Ohio, Louisiana, Pennsylvania, South Carolina and New York have followed suit. Thus far, none of the bills proposed have proceeded to a vote. Additionally, most of the bills proposed have a limitation on the size of the organization that could take advantage of any retroactive coverage; with most bills applying to businesses with 150 employees or less. [*Fn1] Even if passed, however, these laws would most certainly face constitutional challenges from insurers and trade groups, arguing that they directly violate constitutional contracts' clauses, which would take years in the court system to resolve.

Federal Proposed Legislation: At the federal level, there have been many discussions about what assistance to provide businesses in the wake of COVID-19. Most of the ideas appear to contemplate a prospective solution to pandemic-related losses. One proposal that has received the most attention is the Pandemic Risk Insurance Act (PRIA) proposed by California Representative Maxine Waters, Chair of the House Financial Services Committee. PRIA would operate like

the Terrorism Risk Insurance Act, by creating a federal loss-sharing program that would enable insurers to partner with the federal government to cover significant losses resulting from a pandemic or epidemic to the extent such coverage was elected by the policyholder. PRIA would cap the amount of losses paid by insurance companies and create a federal backstop to fund aggregate losses beyond a threshold (e.g., $250 billion), up to a pre-determined maximum. An early, draft version of the bill was circulated earlier this month, but there are many details yet to be worked out, including whether carriers would be required to offer such coverage.

Based on what we have been hearing from our contacts within the industry on Capitol Hill, there doesn't seem to be much interest in passing any Federal legislation that would require carriers to retroactively cover business interruption losses from COVID-19, despite President Trump's public statement that he "would like to see the insurance companies pay if they need to pay". Several prominent GOP senators have voiced concerns over retroactively changing business interruption insurance contracts to cover pandemics and viruses, arguing that forcing carriers to cover these perils would cause significant economic strain and/or insolvencies given the magnitude of the losses. Insurance company insolvency is raised as a frequent concern by many industry groups, with estimates from the American Property Casualty Insurance Association that business interruption losses as a result of the COVID-19 pandemic could surpass $400 billion per month and that number is just for small businesses (defined as those businesses with 100 or fewer employees).

An alternative to insurance funding for COVID-19 losses is the idea of a Federal recovery fund modeled after the 9/11 Victims Compensation Fund. "The COVID-19 Business and Employee Continuity and Recovery Fund" ("Recovery Fund") would be backed by the Federal government and would be authorized to contract with interested businesses to administer and facilitate the distribution of federal monies

to businesses and their employees. The relief would be tied to requirements to keep employees on the payroll, maintain worker benefits, and meet financial obligations. The payments through the Fund would be grants, not loans, to stabilize the balance sheets of eligible impacted businesses and not add additional debt obligations to these businesses. One of the organizations supporting the idea of the Recovery Fund is The Council of Insurance Agents and Brokers ("The Council"). The Graham Company's President and member of the Board of Directors for The Council, Ken Ewell, continues to work with other Council representatives and members on Capitol Hill to advocate for a strong Federal response to business interruption claims for our clients.

Advocates of the Recovery Fund are hoping to secure funding in Phase 4 of the Federal relief package, but recent comments from Senate Majority Leader Mitch McConnell, voicing concerns over the Federal debt and stating "we can't spend enough money to solve the problem", suggests that additional funding may be on hold for the foreseeable future. More recently, it appears that any further liquidity provided to businesses from the federal government will be tied to the debate as to whether businesses should also receive "liability protections" for coronavirus-related litigation. Senator McConnell has stated that the GOP-controlled Senate would not pass further recovery legislation that does not include these legal protections.

The exposure to businesses for re-opening amidst the pandemic is most likely to come from third-party visitors or customers, but there is also concern that employees could attempt litigation in lieu of, or in addition to, their workers compensation claims.

While Democrats agreed to limit liability of manufacturers and distributors of face masks in the second relief bill signed into law by President Trump, Speaker Nancy Pelosi recently stated, "at the time of this coronavirus challenge, especially now,

we have every reason to protect our workers and our patients in all of this. So we would not be inclined to be supporting any immunity from liability." It seems that this issue could cause both sides to retreat into their respective corners initially, but given the obvious need for more relief to businesses substantially impacted by the coronavirus, there will have to be some resolution of this issue one way or another and hopefully sooner rather than later.

We will continue to keep you posted on state and Federal legislative actions taken in response to the coronavirus pandemic. In the meantime, we have also posted to our website several legislative trackers which you may find helpful in staying up to date on these state and federal legislative actions.

*Fn1 The applicability of the proposed state statutes to employers are based on the number of employees: Louisiana – less than 100 full-time employees; Massachusetts – 150 or fewer full-time equivalent employees in the Commonwealth; Michigan – less than 100 "eligible employees" in the State; New Jersey – less than 100 "eligible employees" in the State; New York – less than 250 "eligible employees"; Ohio – 100 or fewer "eligible employees"; Pennsylvania House Bill – fewer than 100 "eligible employees", Pennsylvania Senate Bill – limits, not applicability, based on size of organization; and South Carolina – no employee count limitation. ("Eligible employee" is defined within the bills as full-time employees who works a normal work week of 25 hours or more).

If you have any questions or are seeking more information, please reach out to: Christa Solfanelli, Esquire, Associate General Counsel, at csolfanelli@grahamco.com.

For additional COVID-19 resources and risk management recommendations, please visit our **COVID-19 Risk Management Center**.

A PDF of the above information can be found **here**.