



COVID-19: Insurance, risks and possible liabilities

Briefing for care providers

2nd Edition 10 December 2020

Introduction

This note is provided by the Care Provider Alliance (CPA) to assist members in considering the potential risks and liabilities arising from the COVID-19 pandemic. It is not intended to be legal advice. Providers should seek independent legal advice if they have any concerns arising from the matters discussed in this note.

CPA also encourages care providers to seek insurance claims where these are appropriate, and to inform us of any problems in renewing policies, significant increases in prices, or new exclusions to policies as a result of COVID-19.

We are aware that this is an ongoing issue. We are monitoring insurance issues and reporting these back to Government and related agencies. We cannot, however, comment or provide advice on individual claims or policies.

We are continuing to seek evidence and push for support on insurance and indemnity issues. If you are facing issues with insurance and COVID-19, please let us know. Contact the CPA at info@careprovideralliance.org.uk.

This briefing was originally published in May 2020 and updated in December 2020. We will review this briefing again following the judgement in [the Supreme Court FCA business interruption case](#). It is unclear if this judgement will be made before 31 December 2020.

Disclaimer

The CPA assumes no responsibility or liability for any errors or omissions in the publication of this communication. The information contained in this update is provided on an “as is” basis with no guarantees of completeness, accuracy, usefulness or timeliness. It does not constitute legal advice.

Risks and liabilities

As the Covid-19 pandemic continues, social care providers are concerned that legal and regulatory risks and liabilities may arise in relation to Covid-19. Possible risks and liabilities that providers should consider could include (but are not limited to):

- Criminal liability and regulatory enforcement for registered providers under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014
- Criminal liability and regulatory enforcement as an employer under health and safety legislation (eg the Health and Safety at Work Act 1974)
- Other criminal offences under s44 Mental Capacity Act 2005, the Corporate Manslaughter and Corporate Homicide Act 2007, etc.
- Civil liability for personal injury/professional negligence/breach of contractual duty of care to service users/residents
- Civil liability for personal injury/breach of contractual duty of care to staff
- Liability relating to deprivation of liberty, mental capacity and best interests
- Liabilities (civil/criminal) relating to “DNA CPR” notices and other treatment escalation plans
- Human Rights Act 1998 damages claims (publicly funded residents)

Situations resulting in prosecution or legal claim

Situations that may arise potentially resulting in a prosecution or legal claim against a provider could include:

- A resident or service user is infected with Covid-19 in the setting and becomes seriously ill or dies as a result. The person or their estate alleges that they were infected by staff or through intra-community transmission.
- A resident or service user with Covid-19 dies in the setting and their estate alleges that the provider negligently failed to arrange medical care for them/arrange for their transfer to hospital.
- A member of staff becomes infected with Covid-19 and become seriously ill or dies as a result. The staff member/their estate alleges that they were not provided by their employer with appropriate PPE and were infected as a result.

- A resident/service user who does not have Covid-19 alleges that a provider has breached its contract with them due to a failure to provide care as a result of Covid-19-related staff shortages.
- The Care Quality Commission alleges that due to insufficient infection control, care and treatment is not provided in a safe way for service users.
- The Health and Safety Executive/Local Authority alleges that a provider has failed to maintain a safe working environment for staff due to inadequate infection control.

Where liability requires proof of how a person was infected with Covid-19 (e.g. proof of intra-community transmission), this may be difficult to establish unless for example the person is shielding and only in contact with the care provider staff. Causation in negligence may be difficult to establish (i.e. but for the provider's negligence, the person would not have been made ill or died).

However notably, some forms of liability above – under health and safety legislation and the Regulated Activities regulations – do not depend on death or injury but only a fault in how care is provided, or failure to maintain a safe workplace.

Insurance

Care providers should have in place both employers' liability insurance and public liability insurance. However, insurance will not protect against prosecution (although it could possibly cover fines and costs – providers should confirm) and in addition, there may be relevant exclusions in providers' policies. Even where insurance can protect providers, insurance companies may exclude Covid-19 or pandemic-related claims at the point that policies come up for renewal, or hugely increase premiums for the sector in order to cover Covid-19 related risk.

Emerging evidence

The [Care Provider Alliance surveys](#) in May, June and September 2020, indicate that:

- providers will face some claims, particularly as a result of supporting people who have not been tested
- the insurance market is shrinking
- insurers are seeking to limit their liability
- costs are rising where cover is provided.

In September 2020, 98 care providers informed the CPA that, there has been a 19% increase in the cost of insurance this year (31% since 2018), with most providers stating that policy restrictions and exclusions have been applied relating to potential COVID-19 claims. The extent of insurance cover has also been reduced for some policies and the number of insurers in the market declined reducing choice and availability.

70% of respondents to the CPA survey in September 2020 reported an increase in the price of insurance this year in comparison to what they paid in 2019.

48% said there had been exclusions/restrictions applied, with COVID-19 being the main issue affecting Public and Employers' liability insurance and professional indemnity insurance. A number of care providers also stated restrictions to business interruption insurance.

Providers reported a decline in the number of insurers in the market with some insurance companies refusing to quote, or pulling out of the sector entirely.

It is still early days to fully assess the financial impact of the cost increase, as most providers have found ways to finance the additional costs in order to continue providing services. However, ongoing operational costs during the pandemic means that care providers have the added burden of seeing their costs significantly increase in the event of a claim being brought against them for Covid. As at September 2020, the potential risk of such claims had not been fully considered, with most providers trying to continue with business as usual until such a time as this becomes an issue for them directly. Such an approach poses significant risk to providers and the sector as a whole. Should there be the event of a class action, or a successful claim setting a precedent for future claims, the care sector as it stands will be significantly exposed.

Direct quotes from care providers offer more insights into the fragility of the market due to insurance concerns:

“We are currently in the process of renewing our insurance so the increase in premium and changes in cover have not had any effect yet but we will have to review our practices going forward in light of the fact that we will be carrying an uninsured risk of claims from our residents, their families and other visitors to our services in relation to COVID-19. We will be reviewing our visiting policies and also reviewing the cost of carrying the risk... Our Employers liability premium has been increased by 94% on last year which is entirely due to the COVID-19 risk.”

“Our broker has approached the following insurers who have all said they are not taking on any new business and are therefore not able to offer us cover: AIG, Aspen, AWAC, CV Star, DUAL, Ecclesiastical, Everest RE, Liberty,

Markel, Newline, ProSight Syndicate 1110, QBE, RSA, Travelers, ZMI and Zurich.”

“Without COVID cover the personal risk is too high and we are considering closing the service.”

“The package included liability cover however there is an Covid-19 exclusion which also excludes pandemics and epidemics going forward.”

We have also been advised by insurance brokers that it is becoming common practice at the point of insurance renewals for care providers to be asked to complete a questionnaire on their infection control practice and to advise of the likelihood of any claims that they are aware of which may arise during the period of the insurance.

There is also emerging evidence that providers who do not follow the guidance on PPE may have issues with invalidating their insurance.

We have raised these issues with colleagues at the DHSC as part of our ongoing work to ask for indemnity for care providers.

Designated services

The Adult Social Care Winter Plan 2020/21 includes a commitment to deliver a [designation scheme](#) with the Care Quality Commission (CQC) of premises for people leaving hospital who have tested positive for COVID-19 and are transferring to a care home.

There are concerns that these services will struggle to gain adequate insurance cover, putting the organisations running the schemes at increased risk. The CPA will continue to monitor this situation directly with the designated services.

Tips on seeking renewals

When reviewing your insurance, care providers should:

- **Start the renewal process early:** Engage with an advisor or your current broker, or both, at least six weeks before renewal
- **Present the positives of the risk:** Give as much information on positive risk actions that are being taken as possible. You need to show that you are a good risk to insure
- **Look out for exclusions:** Brokers should be pointing out any exclusions to cover that are added at renewal, but if you are unsure, you should ask about exclusions. Each policy schedule will show the cover provided and then,

either at the end of each cover section or the end of the document, there will be endorsements that either restrict or enhance cover.

- **Use a care sector specialist:** In these turbulent times it has never been more important than to work with a broker who has expertise in the care sector and the relationships with insurers that make difficult conversations a bit easier.
- **Consider commissioning an external audit:** Some brokers offer a full package of insurance and risk management which can include an external audit undertaken by a specialist. This can help to improve your risk if you are struggling with getting insurance quotes due to a particular reason.

Indemnity

The Coronavirus Act 2020 has responded to the risk of NHS medical negligence liability in England and Wales by providing for an indemnity scheme in section 11 for tortious claims relating to death, personal injury or loss arising from the Covid-19 pandemic (including by staff and non-Covid-19 patients) where neither existing indemnification schemes nor insurance will cover health service providers.

Indemnity, for the avoidance of doubt, means that the government would financially indemnify (put providers back in the position that they would have been in) providers in relation to the relevant claim, covering damages and settlements and we would expect, legal costs. It is distinct from immunity which refers to circumstances where no claims can be brought.

CPA position

For this reason, the Care Provider Alliance is asking the Department for Health and Social Care to set up an indemnity scheme for the social care sector equivalent to that provided by section 11 of the Coronavirus Act 2020 in combination with other NHS indemnities, for health service providers.

Any such indemnity scheme should cover tortious claims and breaches of contract arising from the Covid-19 pandemic. It should be noted that no indemnity scheme could protect against all the forms of liability outlined above and that providers should continue to mitigate risk, obtain appropriate insurance cover and follow relevant law and guidance.

Regulation, insurance and indemnity

CQC guidance on the Care Quality Commission (Registration) Regulations 2009, reg 13, provides that:

“The provider must have insurance and suitable indemnity arrangements to cover potential liabilities arising from death, injury, or other causes, loss or damage to property, and other financial risks.”

Regulatory action can be taken by CQC for breach of this reg 13. If providers are unable to obtain insurance cover in relation to Covid-19, and are not indemnified by government, then not only might they decide to withdraw from the care market, they might also be subject to regulatory enforcement by CQC if they do not withdraw.

Providers are not able to contractually exclude liability for death or injury in relation to Covid-19 from their own contracts with service users. Employers also commit a criminal offence if they do not have in place employers' liability insurance for injury or disease (under s1 of the Employers' Liability (Compulsory Insurance) Act 1969).

Market fragility

CPA is aware that the market in both domiciliary care and care homes is fragile in that domiciliary care providers are operating on tight margins that are already being stretched by the need to purchase additional PPE. Care homes are also being affected by reductions in occupancy. If providers are forced to pay a lot more for insurance, and/or are not indemnified against tortious and/or contractual legal claims related to Covid-19 not covered by insurance, they are unlikely to be able to remain in the market – particularly in relation to publicly funded care.

In relation to self-funders, the additional costs relating to insurance and/or risk of liability may be passed on by the care provider to the consumer (i.e. the self-funder), resulting in care becoming unaffordable to many people.

The Coronavirus Act 2020 does not provide an obvious power to make secondary legislation extending the scope of the s11 immunity to cover social care. Primary legislation may be required, although it may be possible to identify a suitable regulation making power in other health and social care legislation.

CPA position

The CPA believes that what is needed is an indemnity that covers registered providers of both publicly and privately funded care, for tortious and/or contractual claims for death, injury, loss or damage arising during the pandemic, relating to Covid-19 – brought by either staff or residents/service users (or their estates), where employers' liability insurance and/or public liability insurance does not provide cover.

Contacts

Care Provider Alliance

The CPA is monitoring insurance issues for care providers resulting from COVID-19. We cannot provide advice on individual issues, but we can highlight the issues with Government and related agencies. Please contact the CPA if you are experiencing problems with your insurance cover including:

- unable to get renewals or new policies
- exclusions relating to COVID-19 or other communicable diseases
- significant cost increases
- problems making claims.

Contact us at info@careprovideralliance.org.uk

Insurers

The main insurers in the care provider sector, in order of scale, are:

Aviva

Zurich*

Towergate

Howdens

Covea

New India

Phoenix

Markel

Axa

BuildersDirect

Hiscox*

Bollington

Everest

Lloyds

Royal Sun Alliance
Accelerant Insurance Limited
AON UK Limited and Marsh Limited
Argenta*
Barclays
Care Quality Insurance
Dual Olivia
Ecclesiastical*
EUNA
Finsbury Insurance Group
Camberford Underwriting
Integrity Care
RSA*
Liberty
Lockton Companies LLP
Marsh Commercial
NIG
Probitas (Lloyds Syndicate)
QBE*
Hiscox*
Shared Lives Plus Towergate
Barclays
Travellers

**The insurers appealing to the Supreme Court on the test case included: Hiscox, QBE, Arch, Argenta Syndicate Management, MS Amlin and RSA. Following the High Court's judgment, Ecclesiastical and Zurich (two of the original defendant insurers) decided not to pursue an appeal to the Supreme Court.*

Further information

[CPA web pages on Coronavirus](#)

[CPA surveys](#)

[Financial Conduct Authority](#)