

FUNDING AND CONTRACTING SERVICES SPECIAL EDITION BULLETIN

ISSUE 84 | 20 APRIL 2020

Welcome to this special edition of the FaCS Bulletin. This Bulletin is all about insurance in the context of COVID-19, covering scenarios raised with government agencies by service providers. FaCS thanks the Insurance Commission of Western Australia for providing the insurance advice contained in this Bulletin. Because insurance is such a complex issue, it's a longer Bulletin than usual, but we're sure you'll find the information valuable.

The COVID-19 Working in Partnership working group is working with FaCS to finalise a Personal Protective Equipment (PPE) request system for service providers. We will release a FaCS Bulletin with details of the PPE request system and other hot topics very soon. Until then, please contact FaCS with any queries or issues you have regarding community services procurement.

Insurance Coverage and Liability Issues for Service Providers

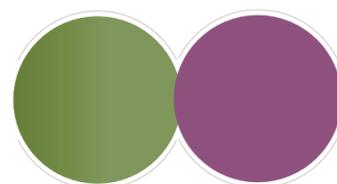
The below comments from the Insurance Commission of Western Australia provides a general overview of the issues canvassed. It is intended to highlight potential issues and prompt consideration of issues. It is not intended as legal or insurance advice for service providers. For greater certainty please consult your insurance broker or insurer.

The Insurance Commission of Western Australia has provided the following general advice in response to scenarios posed by service providers to government agencies, regarding the coverage or limitations of insurance instruments in the COVID-19 pandemic service environment.

Scenario One

A service provider sub-contracts in-reach clinical services from the public health system as part of its service delivery model to clients, on behalf of a government agency. What are the possible insurance coverage and liability issues if, as a result of reprioritised clinical service requirements the public health system can no longer deliver clinical in-reach and the service provider looks to alternate sources of clinical in-reach service (e.g. private providers)?

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Insurance Coverage and Liability Issues for Service Providers *(continued)*

Considerations:

- Contractual requirements:
 - Are there any legal or contractual requirements or barriers to changing the provider of in-reach services or sub-contracting? The service agreement between the government agency and service provider should be reviewed or legal advice sought.
 - Are there any additional contractual requirements that need to be considered (e.g. working with children checks)?
- Governance of new sub-contractor:
 - Does the new sub-contractor have sufficient organisational capacity and resources?
 - Does the new sub-contractor meet or exceed clinical services criteria and standards?
 - Is the new sub-contractor accredited/registered to provide the required services?
 - Formal contractual arrangements should be put in place with appropriate indemnity provisions.
- Insurance considerations:
 - Formal contractual arrangements should be put in place with appropriate indemnity provisions.
 - The insurance requirements that form part of the service agreement with the government agency should be mirrored in the contract with the new sub-contractor, including the categories of insurance and the limits of insurance:
 - Public Liability (Include Products Liability if products are supplied as part of the service).
 - Professional Indemnity / Medical Malpractice.
 - Workers' Compensation with Principal's Indemnity extension.
 - Evidence of the required insurance should be sought in the form of Certificates of Currency. Some things to watch for:
 - the category of insurance is as specified;
 - insurance policy limits are as specified;
 - the insurance policy has not expired; and
 - the insurance company is APRA (Australian Prudential Regulation Authority) authorised.

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Insurance Coverage and Liability Issues for Service Providers *(continued)*

- The new sub-contractor may have reduced insurance coverage, limits and exclusions. Whether or not this is acceptable to the service provider depends on the inherent risks associated with the services.

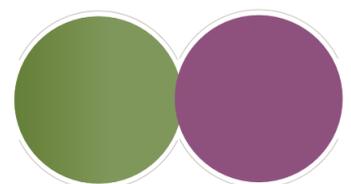
Scenario Two

A service provider delivers face-to-face services to clients on behalf of a government agency. An employee who provides that face-to-face service contracts COVID-19 from an infected client, and the employee subsequently dies. The family of the employee decides to take action against the service provider for failing to protect the employee. What are the possible insurance coverage and liability issues for the organisation in this scenario?

Liability and Insurance Implications

- Liability Implication – Duty of Care
 - Employers have a statutory and common law duty to provide and maintain a safe working environment for their employees. Employers must ensure that they have the appropriate policies, procedures and training in place to meet occupational health and safety and legislative requirements.
 - Negligence must be established for employers to be liable and this determination will depend on the facts. Where an employee contracts COVID-19 it does not necessarily follow that the employer has been negligent.
 - In this scenario some considerations are:
 - Did the employee have the necessary skills and appropriate training?
 - Did the employer have in place necessary and appropriate work practices and guidelines?
 - In the current context are clients screened for potential exposure to COVID-19? For example, are clients questioned about overseas travel?
 - Was there necessary and appropriate supervision of the employee?
 - Did the employer provide the necessary personal protective equipment to employees in the appropriate circumstances e.g. when engaged in high risk activities?

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Insurance Coverage and Liability Issues for Service Providers *(continued)*

- Insurance Implications – Workers’ Compensation Insurance
 - It is mandatory for all employers to have workers’ compensation insurance.
 - Workers’ compensation insurance covers the employer for both statutory and common law liability.
 - In this scenario the employee is entitled to statutory workers’ compensation benefits.
 - The common law insurance component of the employer’s workers’ compensation insurance will respond to actions taken against the employer for negligence.

Scenario Three

A service provider is required to isolate a client who has contracted COVID-19, and as a result is required to provide medical support that it would not normally provide as part of their service model for clients. What are the possible insurance coverage and liability issues for the service provider in this scenario?

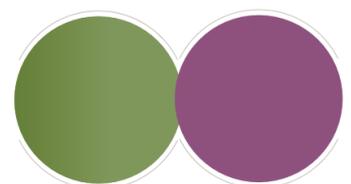
Insurance and Liability Considerations:

- Is the service provider accredited or registered to provide these additional medical support services?
- The service provider’s present insurance cover is based on the set of activities declared to the insurer in a proposal form. The insurer has assessed the risks associated with these activities and charged a premium reflective of these risks.
- New activities or services the service provider commences may not be covered by their insurance as they may fall outside of the risks contemplated by the insurer. This change in services may jeopardise the service provider’s insurance cover.

The service provider should contact their insurance broker/insurer to advise them of the change to the service provider’s activities prior to the change being implemented.

- The insurer may request additional detailed information to understand the change in the risk exposure. This may attract an additional premium charge.
- The service provider should seek written confirmation from the insurer that the new activity or service is covered. The service provider should also ask the insurer if this change in business activities places any new limitations on the cover or requirements of which they should be aware.

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Insurance Coverage and Liability Issues for Service Providers *(continued)*

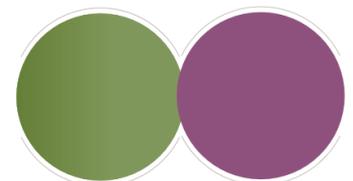
- The service provider should:
 - Conduct a risk assessment of the new business activity.
 - Implement the necessary risk controls and risk mitigation measures.
 - Ensure that the appropriate procedures have been implemented to provide a safe working environment for its employees and clients. This may include training employees in the new procedures etc.

Scenario Four

A variation of Scenario Two - a client requires assistance, is infected by the employee of the service provider, and the client dies. The client's family wants to sue the service provider for not providing a safe environment.

Insurance and Liability Implications

- Actions against the service provider alleging negligence should be covered by the service provider's liability insurance policies.
- Depending on the nature of the service or activity the insurance category will be Public and Product Liability or Professional/Medical Liability insurance.
- Whether or not the service provider is liable will depend on the facts of the case. For example did the service provider know the employee was infected?
- Some considerations include:
 - Did the employee have the necessary skills and appropriate training?
 - Did the service provider have in place necessary and appropriate work practices and guidelines?
 - Are employees screened for potential exposure to COVID-19? For example are employees questioned about overseas travel?
 - Was there necessary and appropriate supervision of the employee?
 - Did the service provider provide the necessary personal protective equipment to employees in the appropriate circumstances e.g. when engaged in high risk activities?



Insurance for Volunteers

The three key categories of insurance that service providers should consider having in place for volunteers are Personal Accident insurance, Public/Personal Liability insurance and Property insurance.

Volunteer Personal Accident Insurance

Volunteers do not fall within the definition of a “worker” as defined in the *Workers Compensation and Injury Management Act 1981*, and therefore are not entitled to workers’ compensation benefits when they are injured while volunteering for service providers.

- Personal Accident insurance covers volunteers injured as a result of an accident, whilst engaged in/undertaking activities or duties arranged and authorised by service providers.
- The Personal Accident insurance products offered by insurance companies may vary but in broad terms Personal Accident insurance should cover:
 - Bodily injury, death, permanent or partial/temporary disability, caused by an accident.
 - Loss of income, medical expenses, vocational rehabilitation expenses, funeral expenses and housekeeper expenses.
- Personal Accident insurance will not usually cover injury caused by disease, illness, natural causes, pre-existing conditions or intentional self-injury.

Volunteer Public/Personal Liability Insurance

Volunteers should be protected from third party legal actions taken against them, whilst engaged in volunteer activities, and whilst acting in good faith under the direction and control of the service provider.

- The service provider’s Public Liability insurance policy should cover its volunteers. A separate Public Liability insurance policy specifically for volunteers should not be necessary.
- Service providers should ensure that the definition of the “insured” within the insurance policy explicitly includes volunteers. If not explicitly stated, the insurer should be requested to extend the organisation’s insurance cover to explicitly include volunteers. An extra premium charge may apply.
- The insurer may request details of the number of volunteers engaged by the service provider and the activities volunteers undertake.

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Insurance for Volunteers *(continued)*

Volunteers' Personal Property Insurance

Volunteers' personal property used in connection with the business of the service provider should also be insured by the service provider.

- The service provider's Property insurance policy should cover its volunteers' personal property, used in connection with volunteering activities. A separate Property insurance policy specifically for volunteers' personal property should not be necessary.
- If not explicitly stated, the insurer should be requested to extend the service provider's insurance cover to explicitly include volunteers. An extra premium charge may apply.
- The insurer will/may request details of the property to be covered and their respective values.
- Volunteers' money and jewellery would generally not be covered by insurance policies that cover volunteer personal property.

For more information on COVID-19

The Western Australian Government is prepared and has taken precautions and implemented measures to minimise potential impacts to the community. The WA Government Pandemic Plan sets out arrangements for protecting the community. [The Plan](#) includes practical advice for government agencies, private businesses, the community, households and individuals.

Members of the public can telephone the COVID-19 Health Information Line on 1800 020 080 for advice and find more information, including specific clinic locations, by visiting the Department of Health's [Healthy WA](#) website.

Please contact [Funding and Contracting Services](#) at the Department of Finance if you have any contract-specific enquiries.

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