The Workplace Recovery Act: A Public-Private Partnership Solution White Paper

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- **Workplaces are deteriorating rapidly as a result of the COVID-19 pandemic, and without immediate action millions of jobs could disappear permanently.**
  Action is needed to ensure the viability of American business and the prospect for maximum continued employment in the event of national or regional crisis.
- **Time is of the essence to recover American workplaces.**
  A national business-interruption plan applying existing insurance and financial services infrastructure is needed to ensure fast, efficient, and accountable distribution of funds; maintain employees on workplace payrolls; and reduce strain on the financial and human resources of state unemployment programs.
- **The American economy runs on confidence and the Workplace Recovery Act is needed to restore that confidence at all levels.**
  - *Citizens need to have confidence in the capability of the government to effectively address this crisis.*
  - *Business owners need to have confidence that they will be able to re-open their businesses after the crisis.*
  - *Employees need to have confidence that they will be able to pay their bills during the crisis and that their jobs will be there when it passes.*

Executive Summary

A **Workplace Recovery Act** is proposed that would implement a national business-interruption insurance plan that can help solve the crisis that threatens the loss of millions of American workplaces. This plan follows and expands on existing precedents for national coverage of risks that are uninsurable by the private sector, such as the Terrorism Risk Insurance Act. By utilizing existing avenues and structures for payment of claims, funds provided to businesses can allow them to remain viable until shutdowns end.

The plan would pay for 90 percent of operating-revenue losses by businesses for time periods beginning March 1, 2020. Claim funds would be earmarked and restricted to pay payroll, operating costs, and rent and debt payments. There would be no coverage for lost profits.

The Workplace Recovery Act will rely on the federal government to fund all payments, but will utilize existing private-market structures to process claim payments where available, and rely on government structures for such processing only where necessary.

The Act would be structured in two parts.

The first would provide a form of business-interruption payments to be processed and paid by existing insurance companies in cooperation with, and with full funding by, the federal government. All businesses with a current commercial insurance policy that are experiencing business losses may file a claim under the plan with their insurance company, which would then process and pay the claim.

The second structure would process the claims through an existing government program for those businesses without a current commercial insurance policy. This second structure would utilize the Federal Disaster Unemployment (DUA) system to process and pay claims submitted by businesses without a current insurance policy. For the purposes of this program, the DUA would be expanded to include business claims, and would utilize the same qualification and payment structure as the Business Interruption program.

This Workplace Recovery Act would expand on other existing programs recently enacted, such as the Small Business Administration (SBA) loan program, but would provide a longer lasting plan to deal directly with businesses experiencing lost revenue. The SBA loan program allows only small businesses to participate and is irrespective of business losses The SBA program would forgive the loans after a set period of continued operations and payments of employee salaries. Under this proposal, all businesses will be eligible but would only receive relief if experiencing business losses. The payments will be direct relief and would extend to the end of the year as long as the business continues to realize losses. In short, the Workplace Recovery Act will be aimed at business continuity and employee retention.

The intent is to keep businesses in business—and employees employed.

Background

Shutdowns to protect Americans from COVID-19 are destroying American workplaces

The scope of the damage caused by the COVID-19 virus is unprecedented. Every American has felt the impact of the virus. For those who have been infected, the impact has been particularly acute. But no one is immune to the spread of the virus and every aspect of our society and economy has been profoundly affected.

Through no fault of our own we have seen the value of our retirement nest eggs reduced. We have been forced to live with the inconveniences and anxiety caused by "shelter-in-place" orders. We have seen businesses close and millions of Americans lose their jobs. And we are all faced with the uncertainty about when this will end, and what our lives will look like when this pandemic passes.

For businesses at the epicenter of the outbreak, COVID-19 is an existential threat. The hospitality, transportation, and retail industries have been hit particularly hard, with untold thousands of businesses shuttered by government mandate, and millions of individuals laid off, furloughed, or let go. There is a very real possibility that without swift and comprehensive action, many of these businesses will not reopen—and many of those jobs will not return.

Congress has taken important steps to sustain American lives as the scientific and medical communities work to develop effective therapies and a vaccine. Some estimate its actions could save a million American lives. But without restoring workplaces, the ultimate cost in American well-being could exceed the benefit. The cure could be worse than the disease.

More needs to be done—and done quickly—to restore workplaces and set the stage for a prolonged recovery from the damage caused by governmental responses to COVID-19.

Government action to protect the health and safety of the public is constitutionally valid but claims may arise for taking of private property under Article V of the Bill of Rights

The Constitution clearly gives the government authority to respond to severe threats to the health and safety of the public, and officials are acting within the bounds of the Constitution in responding to the severe threat posed by spread of the new coronavirus pandemic.

While the Fifth Amendment to the U.S. Constitution protects private property from unconstitutional takings, current Supreme Court precedent makes it unlikely that the Clause would mandate compensation in the current crisis. While court decisions have long recognized that the Takings Clause requires compensation in at least some situations where the government restricts property rights without actually seizing the property in question, they have also long held that many exercises of the government's authority to protect public health and safety do not qualify as takings.

Nonetheless, given the unprecedented severity of the current crisis, these arguments could still arise in some cases and could complicate recovery efforts. Rather than waste time and resources with litigation, resources should instead be applied to restoring businesses and employees in their role to resurrect the free market economy. The federal government is uniquely positioned to help shoulder some of the burden of restoring the economic engine that is so vital to the nation and to the workers and businesses that drive it.

Business-interruption insurance and COVID-19

Businesses are accustomed to looking to business-interruption coverage to get them through periods like this one, but pandemics are excluded. National litigation over this has already commenced.

Not surprisingly, many businesses are looking to their insurance policies—particularly the business-interruption endorsement that exists in many policies—to provide a financial safety net from the losses suffered as a result of government ordered shutdowns. But what the vast majority of policyholders will find is that coverage for such losses does not exist.

First, of the roughly 30 million small businesses in the United States, less than half purchase a business-interruption endorsement for their property insurance policy. In fact, only about 30 percent of companies with under 100 employees purchase such an endorsement.

Business-interruption endorsements vary but typically cover lost income. Some businesses may purchase broader coverage that includes operating expenses such as rent and utilities. Business owners will less frequently purchase coverage that includes transition expenses (the costs that would cover relocating the business) and payroll.

Even for those businesses that purchase business-interruption insurance, losses due to COVID-19, as well as other viruses and communicable diseases, are generally not covered under the standard endorsements. The standard endorsement language states (see example in Federici, 2013, p. 3):

> *We will pay for the actual loss of business income you sustain due to the necessary suspension of your operations during the period of restoration. The suspension must be caused by direct physical loss of or damage to property at*

premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a covered Cause of Loss.

The language clearly limits loss in business income to losses connected with "direct physical loss or damage to property." This would not include either a collapse of revenues related to governmental restrictions or a reduction in business activity due to widespread illness. As previously mentioned, most businesses—including most small businesses—do not purchase this endorsement. For those that do, coverage for such losses will be excluded. Therefore, while there may be a handful of businesses with specifically scripted policies that might provide some financial relief from the type of business-interruption losses created by the COVID-19 pandemic, it will be rare. Accordingly, although business interruption is a well-understood and broadly available coverage, an immaterial number of businesses will be covered for losses from the current pandemic.

Notwithstanding, given the scope of the damages and the prospect for business to be bankrupted, lawsuits over coverage language and representations are certain. In fact, some lawsuits have already been filed by policyholders demanding insurers to pay such claims, arguing coverage is included in their policy. Some state legislatures are even considering bills that would require insurers to retroactively provide business-interruption coverage for COVID-19 losses to their policyholders—despite the fact that they have never collected premiums to cover such losses and clearly excluded such coverage in the contract language.

These lawsuits and legislation demonstrate the escalating sense of desperation, as economic time has been suspended, and options for survival dwindle. Real solutions are called for. Solutions that will serve American workers. Solutions that will restore the nations workplaces and restart our nation's economy.

Even if successful, it is beyond the scope of the insurance industry to cover for the potential business-interruption losses likely to result from the COVID-19 pandemic. The losses would likely be far in excess of insurers' ability to pay and most businesses elect not to purchase business-interruption endorsements and that COVID-19-type losses are specifically excluded from the policy.

Economic Scope of Government-Mandated Economic Shutdown

Expected losses to American workplaces exceeds the capacity of private sector insurers.

The largest insured loss in history was Hurricane Katrina. Insurers paid more than $82 billion in claims from that storm. By contrast, the nation's largest insurance-company trade group estimates that business-interruption losses from COVID-19, if covered, could be ***$220- $380 billion PER MONTH*** (Simpson, 2020). Such claims payments would quickly exhaust the industry's total policyholder surplus of just under $800 billion (Insurance Information Institute, 2019, p. 55). This is surplus set aside for excess catastrophic claims from disasters that are covered under existing policies and for which policyholders have paid premiums. It makes no sense to bankrupt an entire industry to go along with the millions of other workplaces being destroyed—especially when the next hurricane season is just around the corner.

Of course the economic cost of a federally funded program would also be offset by protecting from even greater reductions to GDP, and savings in other resulting government programs which would be forced to respond to the shutdown.

The Solution: A Workplace Recovery Act

A Business Interruption program for all commercial insurance policies would restore all American workplaces with such policies.

What is needed is a plan that restores the American workplace utilizing the financial resources of the federal government. That is the proper and only source of funding that can address the scope of this problem. The plan uses existing insurance and financial services industry infrastructure where available to deliver a national pandemic business interruption program. This national business interruption program will provide short-term financial assistance to businesses and their employees who are forced to temporarily close their business or who suffer a serious reduction in their revenues. It would allow businesses to continue paying or rehire employees rather than be forced to lay off employees as a result of a national pandemic.

A Workplace Recovery Act will eliminate the uncertainty currently being experienced by millions of businesses and tens of millions of their employees about the ability to sustain themselves and their families during the pandemic, and allow them to reopen their businesses and return to their jobs after the pandemic passes.

Moreover, it will reduce the strain on the financial and human resources of state unemployment programs by mitigating the need for employees who have been laid off as a result of the pandemic to apply for and receive state unemployment benefits.

The program, funded entirely by the federal government, is both simple and comprehensive. The program will function as an addendum to existing commercial insurance policies.

Therefore any business that carries such insurance will have access to make claims and receive prompt payments. Virtually all businesses with employees have some sort of commercial insurance policy. But those who do not will be covered as well. That is covered later in this paper. The essential elements of the coverage follow below.

Business Interruption Payment Formula

A formula that phases out as revenues rise, but allows businesses to reopen quickly.

The program, funded entirely by the federal government, will serve as a business insurance risk pool for pandemics. It will apply as an effective insurance for any business. Claims could be paid by any authorized party. Coverage will be as follows. It is designed to be simple enough to allow insurance adjusters to pay claims from an automated system, and process funds within days of receipt and review. This allows speed and certainty that will restore business confidence and get America quickly reopened for business:

- Businesses will be eligible to receive payments for operating expenses that exceed monthly revenues. The funds must be applied 100 percent to cover payroll, operating expenses, rent and debt service. However, claims will be limited to 90 percent of the difference between average monthly revenues prior to March 1 and current monthly revenues.
- Claims will be paid based on estimates. Claim processors will be given flexibility to rely on estimates and make true ups in subsequent months.
- Claim processors and claimants will be held to a normal commercial standard of acting in good faith, but will be held accountable for gross negligence or willful misconduct.
- Claims may be paid for past months. Afterward claims will be paid monthly, and may include an estimated payment for the upcoming month in order to provide workplace working capital.
- The initial coverage period will be March 1 until December 31, 2020. The formula will cause payouts to phase out as revenues return, which will hopefully be prior to December 31. Without some certainty of sufficient support, businesses will be reluctant to reopen quickly. Therefore, having the policy period last significantly longer than might be necessary will actually lead to accelerating workplace dependence on coverage, by restoring confidence in the economy.
- The program does not cover lost profits during the shutdown or slowdown, but does cover the vast majority of economic damage from mandated economic slowdowns.
- Claims and supporting documentation to demonstrate compliance with the restriction of application of funds will be submitted to the insurer every 30 days and paid within 30 days of submission.
- Coverage under the program is separate from any other types of existing coverages, including existing business-interruption coverage, to avoid coverage conflicts and litigation.
- Claim processors will be paid appropriately for processing claims.

Precedents for Government-Backed High Risk Pools

This national business-interruption insurance follows existing precedent.

There are precedents for government intervention to provide coverage for so-called uninsurable risks. These programs include:

- The National Flood Insurance Program (NFIP)
- The Terrorism Risk Insurance Act (TRIA)

These programs along with various state-provided windstorm and earthquake disaster programs are public-private partnerships designed in a manner as that proposed by the Workplace Recovery plan. Insurance companies manage coverage and process claims, but the basic underwriting for losses is born by the federal government. The principles for creation of such programs are the same; the private market is unable to underwrite the catastrophic risk. The government provides the coverage to insure these risks due to a deemed public purpose.

Although each of these programs have similar characteristics to the Workplace Recovery program, there is one major difference in the nature of the risks that each addresses.

The NFIP and TRIA are federally funded and underwritten programs but policies are written and serviced by private insurance companies in most cases. Premiums are paid by the policyholders who choose to purchase such coverage which is then effectively subsidized by funding from the federal government. The Workplace Recovery program on the other hand would be a separate, fully funded federal program with no premium collected from businesses. It would also be retroactive, to cover the effects of the current pandemic.

The NFIP covers losses that have high frequency and, in most cases, low severity. Some criticize the NFIP because premiums are kept artificially low by the government and there is no risk mitigation component that precludes claimants from re-building in the same flood-prone areas. The nature of the flood risk also limits the geographic scope of losses to areas that can be well-defined.

The TRIA covers losses with a low frequency rate but with a high potential severity. The geographic scope of CEO losses is limited to a single state. And while the geographic impact of a terrorist attack can have national implications—as we saw in the construction and travel industries after 9/11—the property insurance losses from such attack would not likely be national in scope.

Pandemics are also low-frequency and high-severity events but as previously demonstrated, the business-interruption losses from COVID-19 alone would drain the resources of the entire insurance industry within a matter of months. Additionally, in the case of terrorism, hurricanes etc., losses are created by forces beyond the control of private citizens or government. In the case of COVID-19, the vast majority of the economic impact is created by compliance with government public safety programs.

7.9 Percent Average American Company Profit Margin

A 90-95 percent payout is consistent with the average profit margin for American companies.

According to a NYU Stern database for more than 7,000 U.S. companies (updated in January 2018) in many different industries, the average profit margin is 7.9 percent for all companies. If 1,000 financial companies in the database are excluded, the average profit margin drops to 6.9 percent. That means for more than 6,000 companies excluding financials (see chart in [Perry, 2018]).

This supports funding 90 to 95 percent of operating revenues to cover payroll, operating costs, rent and debt service. This will ensure companies are incentivized to reopen, without taxing their accumulated capital past their ability to reopen.

Coverage for 100 percent of American Businesses

Federal Disaster Unemployment Program: An additional coverage mechanism for the minority of businesses that do not have a commercial insurance policy.

The intent of the Workforce Recovery Plan is to provide coverage to 100 percent of businesses that are suffering losses as a result of the COVID-19 pandemic and resulting closures. However, as described above, the proposed business-interruption portion of the plan would provide coverage only to those businesses that have a commercial insurance policy. For those without such policies, an alternative plan is proposed using existing federal government structures. Although most American businesses have a commercial insurance policy of some kind, and would therefore be covered by the business-interruption coverage of the Workplace Recovery plan, some would not. Therefore it is important to have an additional mechanism for coverage.

Federal Disaster Unemployment Assistance Program (DUA)

Using existing government programs provides an additional mechanism for business interruption payments.

This proposal would provide immediate relief to businesses without a commercial insurance policy by utilizing the existing Federal Emergency Management Agency (FEMA) Disaster Unemployment Assistance (DUA) program. The program would be expanded to include businesses as eligible claimants. It would also be expanded to include infectious disease pandemics such as the current coronavirus COVID-19 in the definition of a qualifying disaster.

Using and expanding upon an existing structure within the federal and state governments would provide more immediate relief and cost effectiveness. This would be preferable to creating a new structure within the federal and/or state governments to provide assistance, which would instead result in excessive cost and delays.

Relief is urgently needed to businesses and individuals who are currently suffering the loss of income as a result of the current pandemic and resulting orders to shelter in place.

The current Federal Emergency Management Agency (FEMA) Disaster Unemployment Assistance (DUA) program ([FEMA, 2018]) "is available to states, local, tribal, and territorial governments to provide unemployment benefits and reemployment services to individuals who have become unemployed as a result of a presidential disaster declaration approved for Individual Assistance (IA) and who are not eligible for regular state Unemployment Insurance (UI)." The problem is that the current coronavirus pandemic does not meet the disaster criteria, and recipients are currently limited to unemployed individuals.

FEMA has delegated to the secretary of labor the responsibility of administering the DUA program and payment of DUA benefit assistance.

Following a presidentially declared disaster, FEMA provides funds for the payment of benefits and reimburses the state for its administrative costs. The U.S. Department of Labor (DOL) oversees the DUA program in coordination with FEMA. DUA is administered by the state UI agency which issues a press release throughout the declared disaster area announcing DUA availability.

Currently, to be eligible for DUA benefits, individuals must:

- Not be eligible for regular unemployment insurance (UI);
- Be unemployed or partially unemployed as a direct result of the major disaster;
- Be able and available for work, unless injured as a direct result of the disaster (see conditions below);
- File an application for DUA within 30 days of the date of the announcement of availability of DUA; and
- Have not refused an offer of employment in a suitable position.

Additionally, "one of the following conditions of unemployment or inability to perform services in self-employment must have occurred as a direct result of the disaster" (GTM Payroll Services, 2018):

- The individual has had a week of unemployment following the date the major disaster began;
- The individual is unable to reach his/her place of employment;
- The job no longer exists or the individual was unable to reach the job;
- The individual lost a majority of income or revenue because the employer or self-employed business was damaged, destroyed, or closed by the federal government.

Amend Definition of Disaster

Business-interruption coverage can be added by amending the definition of Major Disaster to cover pandemics.
Under the DUA program, a "Major Disaster" is currently limited to a "natural catastrophe (such as a hurricane, tornado, earthquake, snowstorm flood, etc.) or other types of disasters (such as an explosion, natural gas leak, etc.) that result in a presidential declaration of a disaster. A presidential declaration is made when it is determined that governmental assistance is needed for communities and individuals directly affected by a disaster. DUA becomes available when the declaration is for 'individual assistance including DUA'" (Employment and Training Administration, n.d.). The definition does not include pandemics such as the current coronavirus.

In order to provide necessary relief, the definition of "Major Disaster" should be amended to include infectious disease pandemics such as the current coronavirus COVID-19 disaster. Individuals and businesses who are suffering loss of income as a result of the current pandemic would thus be able to claim benefits in the same manner as those suffering from other major disasters.

Amend Eligibility Requirements

Business claims should be added, so employees can retain their jobs rather than having the disruption of being laid off and applying for unemployment.
Due to the scope of the business losses, this program should be expanded to include claimants who are business owners and do not have insurance coverage to be eligible for the business-interruption plan. Businesses who have experienced loss of operating income as a result of the pandemic would be eligible to file a claim for 90 percent of their business losses in the same manner and criteria as the business-interruption coverage described above.

The initial claim shall include a certification from the business that the payments will be used for the direct payments of operating expenses such as salaries and benefits, rent, utilities, interest, etc. Subsequent claims shall include a certification showing that the previous claim payments were used and fully paid for such operating expenses. As with the business-interruption plan, salaries and benefits shall be determined by averaging the most recent six months prior to March 1, 2020.

Approved claims shall be paid to businesses monthly, with the first payment due within 30 days. Additional monthly payments will be made upon the filing of a certification that the previous claim payment has been used for operating expenses such as rent, utilities, payroll, etc.

Duration of Assistance

The duration can be amended to mirror the national business-interruption insurance plan.
The current DUA benefits are generally paid for up to 26 weeks beginning with the first week following the date the major disaster began, and ending with the 26th week following the date the major disaster is declared by the president, as long as the individual's unemployment continues to be a direct result of the disaster. The time period should be made consistent with the business interruption option discussed above.

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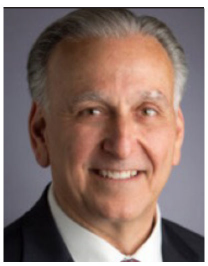

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About Texas Public Policy Foundation

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The public is demanding a different direction for their government, and the Texas Public Policy Foundation is providing the ideas that enable policymakers to chart that new course.

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