

Coronavirus and the Auto Exposure

Author: [Chris Boggs](#)

Over the last several days the VU has fielded several auto insurance related questions. These questions cannot be classed simply as personal auto or business auto questions because the most common question involves both policies.

As of this writing, 21 states (California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont and Washington) have shut down restaurants and bars to in-house dining. Restaurants in these states are limited to take out or delivery.

Delivery is a new concept for most of the restaurants effected by this regulatory action. So, the new most-common question agents receive, "Am I covered for delivery?"

What appears to be such a simple question "simply" isn't.

The simple answer is, yes, the restaurant is covered for its auto liability exposure – well, maybe there is coverage. The more complicated answer is, yes, the restaurant is covered, but is coverage adequate for the insured and the employee?

Let's begin by looking at the reality of coverage when the employee is using his or her personal auto to make deliveries for the restaurant. The questions that must be answered include:

- Is there liability coverage in the personal auto policy (PAP) for food delivery?
- Is coverage provided by the business auto policy (BAP) for employees using their personally-owned autos for food delivery?
- Who is covered by the BAP, if coverage is provided?
- Which policy is primary?
- Which policy is excess?
- What key endorsement is needed?

Coverage in the PAP

Decades ago pizza and maybe Chinese food delivery began the PAP's delivery coverage debate. Does the personal auto policy cover pizza delivery or delivery of any kind of food? Note that as we answer this question in light of the current "pandemic panic" situation, we are completely ignoring Grub Hub, Uber Eats and every other such app-based food delivery service. The focus here is solely on food delivery by the employee of a restaurant.

PAP Exclusions of Interest

Whether the PAP provides liability coverage for food delivery is a function of two exclusions: the business use exclusion and/or the public or livery conveyance exclusion.

Business Use Exclusion: The business use exclusion is a non-factor in this discussion. The PAP excludes the use of an auto when being used in an auto-related business (sales, service, repair, etc.), unless the car is owned by the named insured, a family member or others provided the car is listed on the PAP. So this exclusion can be ignored.

Public or Livery Conveyance Exclusions: This exclusion may have more teeth. The applicable part of this exclusion reads:

EXCLUSIONS

A. We do not provide Liability Coverage for any "insured":

5. For that "insured's" liability arising out of the ownership or operation of a vehicle while it is being used as a public or livery conveyance.

Does an employee delivering food qualify as either public or livery conveyance? If it does, the PAP provides no coverage. Although generally phrased as one concept, public conveyance and livery conveyance are actually two different threshold requirements (notice the "or" between the terms). Let's define both terms to clarify coverage (or the lack thereof).

- **Public conveyance:** Making the vehicle available for public use (like a common carrier);
- **Livery conveyance:** Carrying persons or property for a fee.

Is food delivery "public conveyance"? No, the vehicle is not available for public use; it is being used by the employee on behalf of his/her employer only, and only for a single purpose – food delivery. Making the vehicle available for public use is what the ride sharing apps do (as well as the food delivery apps). The vehicle is not available to others.

However, does food delivery trigger the "livery conveyance" exclusion? The employee is carrying property (namely food), but is the cost of the food considered a fee? And considering fees, does charging a separate delivery "fee" make a difference?

Courts seem to agree that an employee delivering food for an employer is not livery conveyance even if a separate delivery fee is charged. In a livery conveyance, the fee is charged by the carrier as their remuneration for providing the service. In pizza delivery or food delivery, the fee is charged by the employer for its own purposes (probably a charge for convenience) and is not necessarily for the benefit of the driver.

Remember, the public or livery conveyance is intended to exclude coverage for those who are in a common-carrier-like business, not the person using their personal auto to delivering property for their employer.

This discussion is a long way around to answering the question of coverage in the PAP. Yes, there is coverage for food delivery in the PAP. But this doesn't mean carriers won't try to utilize the public or livery conveyance exclusion if the injury is bad enough.

BAP and Employee Use of a Personally Owned Auto

If, and this may be a big if, the employer/restaurant has a business auto policy, does that policy extend coverage for the employee's use of their personal auto for any reason, particularly to deliver food? Secondly, who is covered?

Is Coverage Provided?

Whether liability coverage is provided by the BAP for an employee's use of his/her personal auto on behalf of the employer is a function of the coverage symbol or symbols used.

- If Symbol 1 – Any Auto is used, yes, there is coverage. If any other primary symbol is used (2, 3, 4 or 7), no, there is no coverage.
- If the primary liability symbol is 2, 3, 4, or 7, the only way there is coverage for use of the employee-owned auto is if Symbol 9 – Non-Owned Auto is also used within the liability coverage.

If either of these requirements is met (Symbol 1 or Symbol 9), then the BAP provides coverage for the employee's use of their personal auto. But that is only part of the issue. Who is covered by the BAP?

Who is Covered by the Unendorsed BAP?

When the employee is using his or her personal auto on behalf of the named insured only the **named insured** is protected by the unendorsed BAP. The exclusion for the employee is clearly stated within the Who is an Insured provision:

1. Who Is An Insured

The following are "insureds":

- a. You for any covered "auto".*

*b. Anyone else while using with your permission a covered "auto" you own, hire or borrow **except** (this means they are excluded from coverage):*

(1) The owner or anyone else from whom you hire or borrow a covered "auto".

This exception does not apply if the covered "auto" is a "trailer" connected to a covered "auto" you own.

(2) Your "employee" if the covered "auto" is owned by that "employee" or a member of his or her household.

Again, this means the BAP protects only the named insured when the employee uses his/her personal vehicle to deliver food. Worse still, because the employee is not an insured in this situation, the employer's business auto carrier can actually subrogate against the employee.

But remember, this is how the unendorsed BAP responds, there is an endorsement that solves this problem. But before we get to the solution, we need to understand how the PAP and BAP dovetail.

Which Policy is Primary and Which is Excess?

Even though the business is benefiting from the employee's use of his/her personal auto, the employee's **personal auto policy** provides primary coverage in the event of a claim. This primary protection extends to both the employee and the employer.

Don't believe me? Here is the policy language:

PART A - LIABILITY COVERAGE

INSURING AGREEMENT

B. "Insured" as used in this Part means:

3. For "your covered auto", any person or organization but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part.

As is seen in this language, the employee's personal auto policy extends coverage to the employer for its vicarious liability for the actions of the employee. Although this wording doesn't specifically state that the PAP is primary, we need only to review the BAP for proof.

The Other Insurance provision in the BAP reads:

5. Other Insurance

*a. For any covered "auto" you own, this Coverage Form provides primary insurance. For any covered "auto" **you don't own**, the insurance provided by this Coverage Form is excess over any other collectible insurance.*

Remember, the PAP is **always** primary when the policy's named insured owns the vehicle and it is listed on the personal auto policy. The BAP is excess, but only for the employer's benefit (unless the policy is endorsed otherwise).

Because the PAP is primary, the first issue for the employee **and** the employer is coverage limits. Are the employee's PAP limits adequate in the event of an at-fault incident? Remember, both the employee and employer are covered.

Consider this scenario, the employee, while delivering food for his/her employer, is involved in an at-fault accident – hitting a surgeon on her way to the hospital. In the accident, the surgeon severely injures her right hand and can no longer perform her surgical duties.

Will the insured (the employee) have adequate limits? Probably not (regardless of the amount). If the employee's limits are exhausted, then the BAP responds on an excess basis – but only for the employer (in an unendorsed BAP).

Let's throw in another "but" or "what if;" what if the employer doesn't have a BAP? Let's end the suspense, this is a very bad situation – for the employer.

If the employer is held to be vicariously liable for the actions of the employee, the employer is financially responsible for damages caused by the employee over and above what the PAP pays. This is true even if there is no business auto policy in place. The lack of insurance does not relieve a legally liable party of its responsibility to the injured party. Legal liability can be direct or vicarious (see the article "[How Does a Person Become Legally Liable](#)").

To avoid this out-of-pocket expense, the employer **needs** a business auto policy to protect its financial assets – at least to the level of coverage.

Lest you get jaded and say, "But Boggs, what is the likelihood the employee will hit a surgeon?" Fair question. The victim doesn't have to be a surgeon, nearly any accident can be financially devastating under the right circumstances.

Two recommendations so far:

- Require the employee to carry relatively high liability limits. At minimum 100/300/50. I recommend higher with an umbrella/excess policy, but there are certain financial realities that may make higher limits too expensive. But remember, don't limit the insured's options by not letting them know that higher limits are available.
- If the business doesn't have a BAP, explain the dangers of not having one; namely that the insured can still be required to pay because of their vicarious liability for the actions of the employee. Recent anecdotal reports are that carriers are not as willing to provide hired and non-owned liability coverage only at this point; but you have to try to find it (even in the E&S market). Some other reports are that certain carriers are going to automatically extend this coverage if the insured restaurant did not provide delivery service previously (if the insured did provide delivery but never bought the coverage, they are on their own, which is OK because they should have had the coverage

A Key Endorsement

Throughout this article, the fact has been highlighted that the unendorsed BAP does not extend protection to the employee when he/she is using his/her personal auto on behalf of the employer. This lack of employee protection can be detrimental to the employee. As was previously discussed, the BAP insurer can subrogate against (seek recovery from) the employee if the BAP has to pay to cover the business owner's vicarious liability for the actions of the employee.

Whether the BAP carrier would want the PR storm that comes with this is irrelevant; they can do it, and if the loss is bad enough, they may. But there is a remedy.

To fix this gap and keep relations between the employer and employee intact, attach the **CA 99 33 10 13 - Employees as Insureds** endorsement. As the title suggests, the endorsement extends insured status to employees when driving their personally-owned vehicles for the benefit of the employer/insured. But this endorsement does NOT change the order of response.

Even with the CA 99 33 attached, the employee's PAP still responds as the primary coverage. The BAP remains excess. The difference is that with this endorsement the employee is also protected by the BAP's excess coverage. Further, as an insured, the carrier no longer has the ability to subrogate against the employer if the loss requires the BAP to respond as excess.

Always attach the CA 99 33 anytime an employee is using his or her personal auto on behalf of the employer, even in non-delivery situations such as are addressed in this article.

Takeaways

In these weird times, unusual measures are being taken by governments, employers and the general public. This reality (or unreality) of this pandemic panic has required us to review the insurance implications of certain situations more closely than in the past – which ultimately may be a good thing.

Keys to remember from this article:

- The PAP is always primary for an employee-owned auto;
- The public or livery conveyance exclusion is intended for those in common carrier type businesses, not food delivery for their employer;
- Don't put it past an insurance carrier to try to use the public or livery conveyance exclusion;
- An employer can be held vicariously liable for the actions of its employees, especially when the employee is using his/her personally-owned auto for the benefit of the employer;
- Because the employer can be held vicariously liable for the actions of the employee's use of the employee-owned auto, the employee should carry relatively high PAP limits;
- Because the employer can be held vicariously liable for the actions of the employee's use of the employee-owned auto, the employer should have a BAP; and
- Because there is no coverage for the employee in the unendorsed BAP, the CA 99 33 should be attached.

Last Updated: March 18, 2020

Source: <https://www.independentagent.com/vu/vu/Insurance/Personal->

[Lines/Auto/Liability/BoggsCoronavirusAutoExposure.aspx](https://www.independentagent.com/vu/vu/Insurance/Personal-Lines/Auto/Liability/BoggsCoronavirusAutoExposure.aspx)