



Returning to Work - What Liability Do Businesses Have?

As businesses are preparing to return to work, one question that is top of mind is what potential liability do I have if someone gets sick due to exposure from my place of business or the work that is being done? The answer will initially depend on who the individual is and how he or she is exposed.

For example, when an employee alleges to have contracted COVID-19 arising out of or in the course of his or her employment, state workers' compensation laws generally provide the exclusive means to address the claim. The relevant inquiries will involve whether the employee can show he or she was involved in an activity where he or she was benefitting his or her employer when he or she was exposed to the virus. Several states have already passed laws providing that health care workers and first responders will be afforded a presumption that the virus was contracted in the course of their employment. However, some exceptions exist that allow injured employees to pursue other forms of relief beyond the workers' compensation "exclusive remedy" framework. These exceptions vary from state to state, but generally require some level of intentional, willful or egregious conduct.

We have already seen some cases attempting to invoke these exceptions. Just yesterday, a class action was filed in Cook County, Illinois against a fast-food franchise restaurant and several of its franchisees alleging numerous claims of unsafe working conditions by franchisee employees and their immediate family members that occurred while the restaurants were still operating as "essential businesses." The allegations include, for example, claims that employees were forced to work in close quarters with other employees, some of whom might have been asymptomatic, the failure to provide adequate personal protective equipment (including the lack of any hand sanitizer) and the failure to provide adequate safety training and instruction to employees relating to COVID-19, such as instruction to report workers who may have been infected with COVID-19. The lawsuit further alleges that the fast food restaurants failed to take adequate steps in response to COVID-19 to protect employees and customers and failed to follow government guidance and recommendations. In addition to asking for monetary damages, the lawsuit seeks injunctive relief to force the defendants to provide adequate personal protective equipment in order to prevent what they claim is a "public nuisance."

In another recent case in Pennsylvania, the family of a deceased meatpacking worker sued the deceased's employer claiming that unsafe working conditions resulted in his contracting COVID-19 and ultimately resulted in his death. The lawsuit alleges egregious conduct—that the employer forced employees to work in close proximity to each other without a proper plan in place, inadequate protective equipment for weeks while knowing the risks of COVID-19 and numerous workers reporting being sick. The complaint also alleges the employer ignored government guidance with respect to social distancing and providing personal protective equipment to its employees. This case is just one example and is sure to be followed by similar claims by employees throughout the country once more businesses return to work.

With non-employees, such as clients, customers, vendors or other third parties who claim to have contracted the virus at your place of business, there are other claims that may be asserted to impose potential liability. These include, for example, premises liability, general negligence, negligent hiring or supervising, negligent

infliction of emotional distress, misrepresentation and false advertising, to name a few. The difficulty in all these cases will be whether the third party can prove causation. In light of the risks of contraction essentially anywhere (restaurants, grocery stores, elevators, hand-railings, mass transit, etc.), the third party's ability to sufficiently identify exposure from your place of business will be difficult. Even so, businesses need to ensure they can present sufficient evidence they took the necessary precautions to avoid exposure.

So what can businesses do to protect themselves from these types of claims and potential liability? Below are some best practices for businesses to consider:

1. **Follow Regulations and Guidance.** Businesses should ensure they know the law. Recommendations from the Department of Labor, Centers for Disease Control, OSHA and state and local executive orders are constantly changing and evolving, sometimes on a daily basis. Businesses need to stay on top of these laws and adapt to them with respect to their internal policies.
2. **Training and Follow-Through.** Businesses need to ensure they are adequately training their employees on COVID-19 related internal policies and to ensure their employees are following the applicable regulations and guidance. Businesses should also ensure they are monitoring their employees to ensure policies and guidance are actually being followed and implement repercussions if they are not.
3. **Insurance.** Businesses should review their insurance policies to ensure they have appropriate and adequate coverage for both workers' compensation claims and third-party liability claims.
4. **Communication.** Businesses should ensure they are communicating appropriately to all stakeholders. While it is important to communicate to your stakeholders that you are taking precautions to address COVID-19 risks through advertisements and social media, businesses need to be careful that they do not overstate what they are actually doing to minimize COVID-19 exposure.
5. **Other Risk Avoidance Strategies.** Businesses should consider whether any aspects of their businesses might lend themselves to other risk shifting strategies. For example, businesses might consider requiring customers, visitors, contractors or others to sign assumption/acknowledgement of risk waivers and releases or some sort of indemnification agreements. ([See our separate article on employee waivers.](#))

While implementation of these and other risk management strategies do not guarantee that incidents and lawsuits will not occur, they will put the company in a better position to defend itself and minimize exposure and liability. Contact [Christina Fugate](#) or [Drew Miroff](#) for additional information and guidance as to your specific risk management needs.

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