

COVID-19 AND PERSONAL INJURY TORT LIABILITY: PRELIMINARY CONSIDERATIONS FOR BUSINESSES

To Our Clients and Friends:

As governments contemplate lifting COVID-19 restrictions, businesses looking to reopen their doors face numerous questions about the legal risks of operating in the midst of a pandemic. Some of the most pressing concerns include identifying the precautions needed to avoid transmission of the virus to employees, customers, or others in proximity to their operations and the potential for liability if individuals become severely ill or die from a COVID-19 infection. Personal injury claims based on COVID-19 are already being filed against businesses in courts across the country,[1] and some fear that a wave of litigation in the wake of the pandemic will threaten economic recovery.[2] Plaintiffs have claimed that defendants failed to properly warn others of the presence of a COVID-19 outbreak,[3] and failed to take reasonable steps to prevent the virus from spreading.[4] Some plaintiffs have even claimed that businesses that do not take sufficient precautions create a public nuisance,[5] which strategy echoes efforts by the plaintiffs' bar to assert public nuisance claims in other contexts, such as opioid, tobacco, and environmental litigation. Indeed, the potential for a high volume of lawsuits has prompted nursing homes to seek executive orders granting immunity from negligence claims involving COVID-19.[6] And others have called for legislation to provide liability protections across many industries.[7] [8]

Here, we preview just a few of the issues likely to shape the scope of liability in personal injury actions related to COVID-19.

Standard of Care

A plaintiff asserting a personal injury tort claim generally must prove that the defendant breached a duty of care owed to the plaintiff. Businesses owe their employees, customers, and others with whom they interact a duty to exercise the level of care that would be exercised by a reasonably prudent person under the same or similar circumstances to avoid or minimize the risk of foreseeable harm. This duty may include warning of dangerous conditions and taking reasonable steps to minimize the risks presented by known hazards.

Courts recognize a general obligation of "one who has a contagious disease" to "take the necessary steps to prevent the spread of the disease." [9] The "necessary steps" depend on the circumstances. As one court explained, "[t]he degree of diligence required to prevent exposing another to a contagious or infectious disease depends upon the character of the disease and the danger of communicating it to others." [10] In that case, the court reversed dismissal of a complaint alleging that the defendant, who owned a two-family residence and occupied one of the units, was negligent in failing to warn the other family that she had tuberculosis and in failing to avoid close personal contact. A similar duty may extend

to others who have some relationship with the sick person and knowledge of their condition, and are thus in the best position to prevent the spread of the disease. For example, a physician whose patient receives an HIV-contaminated blood transfusion has been found to owe a duty of care to the patient's future, unidentified sexual partners to inform the patient of the potential for HIV transmission.^[11]

In the context of COVID-19, the applicable standard of care is an open issue, and various plausible scenarios present particular challenges. For example, while it seems uncontroversial to ask symptomatic employees to stay home, to what extent should that employee's potential contacts within the workplace be similarly restricted even if they have not manifested any symptoms? How long should sick employees remain away after recovering, especially when COVID-19 infection, which resembles other common illnesses, has not been confirmed by a positive test result? And given the current limitations on access to reliable testing, are businesses obligated to take affirmative steps to detect sick employees and customers?^[12] How much certainty is needed before a duty arises to warn other employees and customers about the potential infection? The level of precautions a business can reasonably take has implications not only for personal injury liability, but also, as noted above, for nuisance claims arguing that insufficient protective measures in the workplace threaten the entire community.

Guidance from public health agencies, such as that recently issued for employers by CDC^[13] ^[14] and OSHA,^[15] will have an important role in shaping the standard of care.^[16] Businesses should monitor current guidance from state and federal agencies and act with that guidance in mind. Acting consistently with guidance from public health authorities or other governmental authorities is likely to benefit a defendant faced with personal injury tort claims. Conversely, a defendant that has not followed public health authority guidance is likely to see that same guidance asserted by future tort plaintiffs as the basis for a standard of care that plaintiffs will argue was breached.^[17] However, since current guidance is subject to change, is typically presented at a high level of generality, and often leaves details to the discretion of the employer based on circumstances, businesses should not assume compliance with agency guidelines necessarily provides a safe harbor against tort liability just as compliance with statutory and regulatory obligations generally does not bar tort claims.

Additional sources of information on the standard of care include trade association guidance and common practice in the industry. After all, “[c]ourts will not lightly presume an entire industry negligent.”^[18] Thus, it is advisable to be aware of the measures similarly situated businesses have adopted to mitigate the spread and risks associated with COVID-19 in considering the reasonableness of measures for your business.

The contours of the standard of care will also continue to solidify as scientific understanding of the virus—and the nature of the risks it presents—grows. Relevant factors include the means and likelihood of transmission at various stages of infection and the risk of serious illness or death upon infection. These characteristics of COVID-19, which inform whether it is reasonable to take very stringent precautions, remain poorly understood, though research is advancing rapidly.

Causation

A personal injury tort plaintiff must also prove that the defendant's breach of the duty of care proximately caused the claimed injury. Here, plaintiffs are likely to face challenges. COVID-19 is already widespread and highly contagious, and symptoms may not develop for several days after infection; indeed, some may be infected and infectious without any symptoms at all. As a result, many people who become sick could have difficulty establishing by a preponderance of the evidence where and when they contracted the virus. This was true in the case of a nurse whose estate claimed she had been negligently exposed to H1N1 when she was asked to care for suspected H1N1 patients without an N95 mask, contrary to CDC guidance. The court found that given the absence of evidence that the nurse actually treated an H1N1 positive patient and the fact that the virus was present in the community at large, the plaintiff's claim of causation did not rise above the level of speculation.[19] In a case involving Valley Fever, which is caused by a soil fungus common in the San Joaquin Valley of Central California, causation could not be proved beyond a mere possibility, as opposed to a reasonable medical probability, "[g]iven that over one-third of the population in the San Joaquin Valley tests positive for exposure to the fungus, and due to the great number of reasons for soil disturbance." [20]

COVID-19 presents similar causation issues, although cases arising in nursing homes, prisons, and other locations in which residents, or plaintiffs, had little contact with the outside world during the likely period of infection present a possible exception. These dynamics also could change once the initial wave of COVID-19 cases subsides and it becomes more feasible to trace the origins of individual outbreaks.

Workers' Compensation Exclusivity

Many injuries sustained in the workplace are redressed exclusively through the states' workers' compensation systems,[21] which generally provide for more streamlined resolution of claims and cap recoveries for certain injuries. Not all workplace injuries are subject to workers' compensation exclusivity, however, and the scope of exceptions varies from state to state. In California, for example, exclusivity does not apply where the employee's injury is aggravated by the employer's "fraudulent concealment" of the existence of the injury and its connection with the employment.[22]

For infectious diseases, workers' compensation is generally available only where the job subjects the employee to a heightened risk of contracting the disease as compared to the general public.[23] A healthcare worker who contracts COVID-19 after treating infected patients presents a straightforward example of an occupational disease, but application of the rule is less clear for workers whose jobs merely require regular interaction with the general public, since the general public itself is the source of the worker's risk. Concerns about the volume of workers' compensation claims and the difficulty of demonstrating a causal connection to the workplace have motivated some states to adopt presumptive eligibility measures for certain classes of employees, including law enforcement, healthcare, and other essential workers.[24]

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In sum, COVID-19 personal injury lawsuits have already made an appearance, and the volume of this litigation is likely to grow as businesses reopen and Americans increasingly encounter the virus in their

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workplaces, crowded venues, and interactions in business centers. Businesses and employers face uncertainty regarding the undeveloped standard of care for COVID-19 personal injury claims, but should frequently have reasonable causation defenses under traditional principles of tort law. Further, the extent to which the workers' compensation system will absorb employees' claims against their employers may depend on the risks of infection specific to the employee's job and exceptions to workers' compensation exclusivity that vary from state to state. For a more comprehensive review of workers' compensation issues raised by the COVID-19 pandemic, please refer to the Gibson Dunn Labor and Employment practice group client alert entitled, "Employer Liability and Defenses From Suit for COVID-19-Related Exposures in the Workplace."

[1] Daniel Wiessner, *Estate of Walmart worker who died from COVID-19 sues for wrongful death*, Reuters, Apr. 7, 2020.

[2] Editorial Board, *Stopping a Lawsuit Epidemic*, Wall St. J., Apr. 23, 2020.

[3] Tim Reid, *Seattle-area nursing home hit with wrongful death lawsuit over coronavirus death*, Reuters, Apr. 10, 2020.

[4] *See* Wiessner, *supra* note 1.

[5] Noam Scheiber and Michael Corkery, *Smithfield Meat Plant Conditions Assailed as Public Nuisance*, N.Y. Times, Apr. 24, 2020.

[6] Marau Dolan, Harriet Ryan, and Anita Chabria, *Nursing homes want to be held harmless for death toll. Here's why Newsom may help them*, L.A. Times, Apr. 23, 2020.

[7] Evan Greenberg, *What Won't Cure Corona: Lawsuits*, Wall St. J., Apr. 21, 2020.

[8] Natalie Andrews, *Mitch McConnell Wants to Shield Companies From Liability in Coronavirus-Related Suits*, Wall St. J., Apr. 28, 2020.

[9] *Mussivand v. David*, 544 N.E.2d 265, 269 (Ohio 1989) (collecting cases).

[10] *Earle v. Kuklo*, 98 A.2d 107, 109 (N.J. Super. Ct. App. Div. 1953) (quoting 25 Am. Jur., Health, § 45).

[11] *Reisner v. Regents of University of Cal.*, 31 Cal. App. 4th 1195, 1198-99 (1995).

[12] *Compare, Bogard's Administrator v. Illinois Cent. R. Co.*, 139 S.W. 855, 857 (Ky. 1911) (rejecting argument that railroad had an affirmative duty to maintain the capability to diagnose measles in a passenger who allegedly spread the disease to plaintiff's child), *with In re September 11 Litigation*, 280 F. Supp. 2d 279, 293-94 (S.D.N.Y. 2003) (recognizing a duty of airlines to screen passengers for contraband that could be used to hijack the airplane).

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[13] Centers for Disease Control and Prevention, *Interim Guidance for Business and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)*.

[14] Centers for Disease Control and Prevention, *Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19*.

[15] Occupational Safety and Health Administration, *Guidance on Preparing Workplaces for COVID-19*.

[16] See, e.g., *In re City of New York*, 522 F.3d 279, 285-86 (2d Cir. 2008) (“Governmental safety regulations can . . . shed light on the appropriate standard of care.”); *Rolick v. Collins Pine Co.*, 975 F.2d 1009, 1014 (3d Cir. 1992) (holding OSHA regulations were relevant to the standard of care).

[17] See, e.g., *Ebaseh-Onofa v. McAllen Hospitals, L.P.*, No. 13-14-00319-CV, 2015 WL 2452701, at *6 (Tex. Ct. App., May 21, 2015) (noting plaintiff’s argument in lawsuit based on nurse’s death from H1N1 that the standard of care was determined by CDC’s purported requirement that healthcare workers use N95 masks when treating patients suspected of having the virus).

[18] See *In re City of New York*, 522 F.3d at 285.

[19] See *Ebaseh-Onofa*, 2015 WL 2452701, at *7.

[20] See, e.g., *Miranda v. Bomel Construction Co., Inc.*, 187 Cal. App. 4th 1326, 1336 (Cal. Ct. App. 2010).

[21] See, e.g., Cal. Labor Code § 3602(a); 19 Del. Code § 2304.

[22] Cal. Labor Code § 3602(b)(2).

[23] See, e.g., *Bethlehem Steel Co. v. Industrial Accident Commission*, 21 Cal.2d 742, 744 (Cal. 1943).

[24] Russell Gold and Leslie Scism, *States Aim to Expand Workers’ Compensation for COVID-19*, Wall St. J., Apr. 28, 2020.



Gibson Dunn’s lawyers are available to assist with any questions you may have regarding these developments. For additional information, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm’s Coronavirus (COVID-19) Response Team or its Environmental Litigation and Mass Tort practice group, or the following authors:

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