

EMPLOYER LIABILITY AND DEFENSES FROM SUIT FOR COVID-19-RELATED EXPOSURES IN THE WORKPLACE

To Our Clients and Friends:

I. Overview

In recent weeks, legal commentators have predicted that employers will face an “explosion” of employee lawsuits for tort claims relating to the COVID-19 pandemic.[1] As non-essential businesses begin to develop plans for reopening—and essential businesses continue to navigate the unprecedented challenge of remaining operational during a pandemic—employers worry that one wrong step might expose them to sweeping legal liability. Perhaps most concerning for employers is the specter of class action lawsuits alleging that unsafe workplaces have caused employees to contract COVID-19 or left them at heightened risk of exposure, which the U.S. Chamber of Commerce considers to be possibly the “largest area of concern for the overall business community.”[2]

While many employee lawsuits can be expected, employers likely have statutory defenses that mitigate the risk of liability in these lawsuits. Specifically, assuming COVID-19 is a covered occupational disease or injury, most tort claims for monetary damages filed by employees against their employers should be barred by applicable workers’ compensation statutes. Employers should, however, be aware of the limitations and exceptions under applicable workers’ compensation statutes. Those statutes vary state by state, and while a 50-state survey is beyond the scope of this alert, we focus here on relevant principles from the workers’ compensation statutory schemes in three of the most populous states: New York, California and Texas.

In addition, while beyond the scope of this alert, there are many inherent challenges for employees to adequately allege or prove causation in these COVID-19 exposure cases.[3] Proof of causation will necessarily require an individualized examination of workplace interactions and alternative sources of exposure; in light of the risks of contraction virtually anywhere—from restaurants, to elevators, to mass transit—the employee’s ability to sufficiently identify the workplace as the source of exposure defies credulity in most circumstances. And, that individualized assessment of causation and the myriad sources of exposure to COVID-19 likely would doom any putative class action as well.[4] It is important to note that, given these causation challenges, some states have already proposed or enacted legislation providing a presumption of causation that certain first responders contracted COVID-19 if exposed in the course of their employment.

Any “explosion” of COVID-19 exposure suits will impose substantial costs on employers in defending these lawsuits, even if they are meritless. For that reason, both the U.S. Chamber of Commerce and Senate Majority Leader Mitch McConnell have called for federal legislation to shield businesses from exposure liability.[5]

II. Recently Filed Workplace Safety Lawsuits

A number of lawsuits seeking relief for alleged exposure to COVID-19 have already been filed by employees against employer-defendants.^[6] Wrongful death claims have also been filed against decedents' employers for deaths related to COVID-19 infections allegedly contracted in the workplace. In another suit, a group of employees seeks to recover damages against a temporary staffing agency for allegedly misleading nurses to work in unsafe environments and providing negligent care.^[7] While many of these suits allege negligence and breaches of various standards of care, some employees, such as unionized employees, seek damages or injunctive relief based on breach of contract theories.^[8]

In addition, a number of suits do not seek compensatory damages, but instead seek injunctive relief from employers to ensure a safe working environment.^[9] While such cases may not raise the same financial exposure for employers, they can be disruptive and burdensome to businesses, which could be forced to defend company policies in court or be subjected to injunctions mandating specific and expensive workplace protocols.

Based on a survey of these and other recently filed cases, the potential theories of liability against employers include: (1) failure to properly screen employees for COVID-19; (2) failure to protect employees from other symptomatic (or asymptomatic) persons; (3) failure to cleanse and sanitize the workspace; (4) failure to provide personal protective equipment; (5) failure to implement a social distancing policy; (6) failure to implement a telework or work-from-home policy; and/or (7) failure to implement various government guidelines.^[10]

While some complaints allege that employers have a freestanding duty to take some or all of the above steps, the tort claims are often tied to alleged violations by the employer of federal and state recommendations, mandates, guidelines, and regulations regarding employee safety. For example, the Occupational Safety and Health Administration ("OSHA"), like many other government agencies, has posted recommendations and guidance applicable in certain settings to the COVID-19 health crisis. OSHA has also identified what it considers to be relevant pre-existing OSHA standards and regulations applicable to the COVID-19 pandemic on its website.^[11] These standards include: (1) OSHA's Personal Protective Equipment (PPE) standards; (2) the General Duty Clause, requiring employers to furnish "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm"; and (3) the Recordkeeping and Reporting Occupational Injuries and Illness Requirement.^[12] Employers should pay careful attention to applicable federal and state standards and recommendations as appropriate to best protect their employees, to avoid the risk of regulatory investigations or actions, and to minimize the risk that violations of these standards be used as evidence of negligence.^[13]

III. Protections for Employers Under Workers' Compensation Statutes

A. Scope of Workers' Compensation

Although a number of lawsuits have been filed against employers for exposure to COVID-19, most lawsuits for monetary damages relating to workplace-contracted illness should be barred by the

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applicable state’s workers’ compensation statute if COVID-19 is considered an occupational injury or illness. Even if it meets this definition, however, plaintiffs in recent suits are exploring a variety of creative approaches in an effort to circumvent the usual workers’ compensation bar on such claims.

Workers’ compensation is a state-operated insurance scheme designed to allow workers to be compensated for injuries suffered in the course of employment through an administrative process without regard to fault. In New York, employees can receive workers’ compensation for “accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom,”^[14] or for occupational diseases, which are diseases “resulting from the nature of employment and contracted therein.”^[15] Thus, mere exposure to the COVID-19 virus without infection would not result in a compensable workers’ compensation claim. However, a mental injury caused by psychic trauma “is generally compensable to the same extent as a physical injury,”^[16] and plaintiffs may claim that the risk from exposure resulted in such trauma.

But even a disease that is not considered to be an occupational disease under New York law may constitute an accidental injury covered by workers’ compensation if the “inception of the disease [is] assignable to a determinate or single act, identified in space or time” and is also “assignable to something catastrophic or extraordinary.”^[17] The New York Court of Appeals has upheld compensation awards for a tuberculosis infection based on a correctional officer’s exposure to a sick inmate^[18] and aggravated bronchial asthma based on exposure to excessive amounts of secondhand cigarette smoke.^[19]

In contrast to New York, some workers’ compensation statutes define occupational diseases to exclude ailments like the flu or common cold. In Texas, for example, an occupational disease includes “a disease or infection that naturally results from the work-related disease,” but “does not include an ordinary disease of life to which the general public is exposed outside of employment unless that disease is an incident to a compensable injury or occupational disease.”^[20] It remains to be seen whether COVID-19 will be considered an ordinary disease of life. Moreover, despite this ordinary disease exception, Texas courts have allowed “recovery for pneumonia, tuberculosis, and other respiratory diseases which follow as the result of sudden, accidental inhalation of heavy volumes and concentrations of noxious gases . . . or other foreign substances which cause damage to the lungs,” even as they have rejected recovery for “illnesses like cold, sore throat, and pneumonia” from exposure to the elements clearly traceable to work conditions.^[21] And to the extent that an employee attempts to avoid the workers’ compensation bar by arguing that COVID-19 is a common disease of life, such an argument would make causation difficult to establish in a lawsuit attempting to hold an employer liable for an infection.

In California, an illness is not an occupational disease solely because it was contracted after exposure at work; the illness “must be one commonly regarded as natural to, inhering in, an incident and concomitant of, the work in question.”^[22] While not a model of clarity, it is generally understood that “if the employment subjects the employee to an increased risk [of contracting the disease] compared to that of the general public, the injury is compensable.”^[23]

These are fact-specific standards, and courts have yet to decide whether COVID-19 is covered by applicable workers’ compensation statutes. Employers should be mindful of the possibility that, as a result, states may issue more specific guidance or legislate with respect to the availability of workers’

compensation to employees who contract COVID-19. Some states have already proposed or enacted legislation providing a presumption of workers' compensation coverage for certain categories of workers who contract COVID-19. For example, Alaska has passed a law stating that infected firefighters, medical first responders, and peace officers are "conclusively presumed to have contracted an occupational disease" if exposed to COVID-19 in the course of their employment.[24] Minnesota has similarly passed a presumptive occupational disease law for COVID-19 infections by health care workers, law enforcement officers, and child care providers to first responders and health care workers.[25] Wisconsin has passed a law stating that a first responder's injury caused by COVID-19 after the employee was exposed to someone with a confirmed case of COVID-19 in the course of employment is presumed to be an injury caused by employment.[26]

On the administrative front, some state agencies have issued sweeping pronouncements ensuring that first responders who contract COVID-19 are presumptively covered by workers' compensation.[27] By contrast, some states like New York have been more incremental in their guidance. The Chair of New York's Workers' Compensation Board has issued guidance encouraging employees who develop COVID-19 during the course of their employment to file claims, and further encouraging insurance carriers to issue payments pursuant to New York Workers Compensation Law § 21-a—which allows payment of a claim without an initial admission of liability—instead of disputing the claim. [28] The California Department of Insurance, meanwhile, has scheduled a public hearing to entertain a regulatory filing from the Workers' Compensation Insurance Rating Bureau of California (WCIRB), a nonprofit association of insurers, that would exclude COVID-19 claims from an employer's experience rating.[29]

B. The Workers' Compensation Bar

To the extent that COVID-19 is considered an occupational injury covered by the workers' compensation statutes, any tort claim for compensatory damages asserted directly by an employee against her employer, either in an individual capacity or on behalf of a class of employees, is likely to be barred.

Designed to ease the process for dealing with workplace injuries by providing compensation without a liability finding, workers' compensation is generally the exclusive remedy to an injured employee—meaning that the employee cannot maintain a separate, private tort suit against an employer based on a workplace injury. With some limited exceptions, most employers are required to provide their employees with workers' compensation coverage.[30] Texas, however, does not require employers to provide workers' compensation coverage.[31] Texas employers who do not provide coverage, "non-subscribers," are subject to personal injury lawsuits for workplace injuries and do not benefit from typical tort defenses such as assumption of the risk, contributory negligence, and co-worker negligence.[32]

In New York, an employer's liability under the workers' compensation law is "exclusive and in place of any other liability" to an employee, the employee's representative, or any person otherwise entitled to recover damages, contribution, or indemnity on account of an employee's injury or death.[33] This exclusive remedy bar also applies when an "employee is injured or killed by the negligence or wrong of another in the same employ . . ."[34] The exclusive remedy bar also prevents recovery by an employee who has received workers' compensation benefits from a general employer, but then seeks to recover from a special employer to whom the employee was assigned to work by the general employer.[35] This

might be relevant, for example, where a business (the special employer) retains dedicated contractors (such as a cleaning staff) that the business controls but are procured through a separate company (the general employer) in charge of hiring and payroll. The exclusive remedy bar can also be raised as a defense to claims brought on behalf of a putative class of employees.[36]

Some plaintiffs may attempt to avoid the workers' compensation bar by asserting claims on behalf of the public at large, such as the public nuisance claim asserted in one recent COVID-19-exposure lawsuit.[37] Some courts, however, have concluded that such a claim is an improper effort to circumvent the workers' compensation bar.[38] And there are other challenges employees would face in asserting a public nuisance claim. "A public nuisance is a violation against the State,"[39] so to bring a private action to abate a public nuisance, the person seeking relief must suffer special injury beyond that suffered by the community at large; this injury must be different in kind, rather than different only in degree.[40] An employee may have difficulty in showing such special injury distinct from the risk to the community in a COVID-19-related lawsuit.[41]

IV. Limits of the Workers' Compensation Bar

Although workers' compensation schemes generally establish exclusive remedies for employee injury and illness claims against employers, each jurisdiction has particular exceptions that allow workers to maintain individual tort suits against employers. For example, a common exception to the exclusive remedy rule is an employer's intentional conduct toward employees. In addition, while the bar generally protects employers from liability for direct employee claims, employers may face exposure from claims brought by third parties whom the employee sues, as well as from nonemployees (such as independent contractors and vendors) or customers who enter the workplace.

A. Exceptions for Intentional Torts/Fraudulent Concealment

In New York, the "exclusive remedy doctrine bars an employee from bringing a negligence- or gross negligence-based claim against an employer and the employer's agent." [42] One narrow exception to the workers' compensation bar applies when an employer commits an intentional tort: "[w]hen it has been determined that a plaintiff's injury is the result of an intentional and deliberate act by the defendant or someone acting on his behalf, the defendant is not entitled to such immunity." [43] To establish an intentional tort, "the conduct must be engaged in with the desire to bring about the consequences of the act; a mere knowledge and appreciation of a risk is not the same as the intent to cause injury[.]" [44] As such, an employer's failure to warn of dangers in the workplace will not be considered an intentional tort, [45] and it will be very difficult for an employee to establish that an employer deliberately exposed him or her to COVID-19 with an intention to infect the employee.

While New York has a narrow exception to the exclusive remedy doctrine, other states have broader exceptions that may be implicated in COVID-19 lawsuits. In California, for example, an employee may overcome the exclusive remedy bar 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[.]" [46] This exception refers to an employer's concealment of knowledge that an employee

has contracted a disease from conditions of work.[47] However, “conflating knowledge of exposure with knowledge of injury . . . is insufficient to support a [concealment] claim as a matter of law.”[48]

And in Texas, gross negligence is an exception to the worker’s compensation bar where suit is brought by the surviving spouse or heirs of an employee who suffers a fatal workplace injury.[49] But gross negligence is not sufficient to allow an employee himself to maintain a separate tort suit.[50] As a result, there is the possibility of tort suits being brought by surviving spouses in Texas, even if COVID-19 were considered an occupational injury covered by Texas’s workers’ compensation statutes.

B. Lack of Coverage for Third-Party Suits

Although New York’s exclusive remedy provision prevents direct tort suits by employees against their employers, there are additional litigation risks involving third parties of which employers must be aware.

An employer may be liable for contribution or indemnity to a third party for any “grave injuries” sustained by an employee for which the third party is held liable, with “grave injury” defined as death, permanent loss of use or amputation of a body part, blindness, and deafness.[51] This may arise where, for example, an employee sues the owner of the property where the employer’s offices are located and then the property owner impleads the employer for indemnity or contribution.[52] Workers’ compensation laws would not bar tenants’ employees from asserting tort claims against the property owners; in the COVID-19 context, such lawsuits may attempt to impose liability for a property owner’s failure to inspect, clean, or sterilize a building and failure to implement procedures to prevent the spread of COVID-19. Property owners that are or should be aware of dangerous conditions in communal spaces such as lobbies, stairwells, or elevators, but fail to exercise reasonable care to prevent injuries in those spaces, may be subject to suit.[53]

Additionally, non-employees, such as independent contractors,[54] are not covered by workers’ compensation and would thus not be subject to the workers’ compensation bar. But, as noted previously, certain workers who are loaned to a “special” employer from a separate “general” employer to perform on behalf of the special employer and subject to the special employer’s control are covered by workers’ compensation and are barred from asserting tort suits against whichever employer was not responsible for workers’ compensation coverage.[55] Employers should evaluate whether dedicated contractors, such as a cleaning staff retained from another employer, are special employees subject to the exclusive remedy bar.

* * *

In sum, while the applicability of workers’ compensation statutes to COVID-19-related claims varies from state to state—and can quickly change even within those states, as legislators and regulators continue to respond to the pandemic—there is good reason to believe that, assuming COVID-19 is a covered occupational disease, most employers will be able to rely on workers’ compensation statutes to avoid direct liability to employees for monetary damages.

Employers should nevertheless take affirmative steps now to protect their employees and minimize their potential liability. To that end, the best factual defense to any potential employee or class action lawsuit

alleging claims related to COVID-19 exposure is to develop appropriate procedures to address the risk of COVID-19 in the workplace,[56] paying attention to applicable guidance from OSHA, the CDC and state or local officials. Such preventative steps may help evidence that an employer satisfied any alleged duty of reasonable care,[57] and may also help discourage lawsuits seeking prospective relief. Moreover, alleged failures to address COVID-19-related risks can subject employers to scrutiny by regulators.[58]

[1] See, e.g., Amanda Bronstad, *Lawyers Predict a ‘Huge Explosion’ in Worker Class Actions Over COVID-19*, Law.com (Apr. 16, 2020), <https://www.law.com/2020/04/16/lawyers-predict-a-huge-explosion-in-worker-class-actions-over-covid-19/>.

[2] U.S. Chamber of Commerce, “Implementing a National Return to Work Plan” (Apr. 13, 2020), available at https://www.uschamber.com/coronavirus/implementing-national-return-to-work-plan?utm_source=email&utm_medium=enl&utm_campaign=laboroflaw&utm_content=20200416&utm_term=law#liability.

[3] Gibson Dunn has discussed standard of care and causation issues related to COVID-19-based lawsuits in more depth in a separate Client Alert. See Gibson Dunn’s May 4, 2020 Client Alert, *COVID-19 and Personal Injury Tort Liability: Preliminary Considerations for Businesses*, available at <https://www.gibsondunn.com/covid-19-and-personal-injury-tort-liability-preliminary-considerations-for-businesses>.

[4] See, e.g., *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, 209 F.R.D. 323, 349 (S.D.N.Y. 2002) (noting that “[Federal Rule of Civil Procedure] 23(b)(3) requires that common issues predominate,” and aggregating examples where courts denied class certification because of individualized issues of fact).

[5] Andrew Kragie, *McConnell Wants Broad Liability Shield in Next COVID-19 Bill*, Law360 (Apr. 27, 2020), <https://www.law360.com/articles/1267837/>; U.S. Chamber of Commerce, “Implementing a National Return to Work Plan” (Apr. 13, 2020), available at https://www.uschamber.com/coronavirus/implementing-national-return-to-work-plan?utm_source=email&utm_medium=enl&utm_campaign=laboroflaw&utm_content=20200416&utm_term=law#liability.

[6] In addition to COVID-19 exposure claims, employers are facing and will likely continue to face claims under the WARN Act and wage and hour, discrimination, leave, whistleblower protection and other laws relating to actions taken in response to the pandemic.

[7] *Allen v. Krucial Staffing, LLC*, No. 20-cv-2859 (S.D.N.Y. Apr. 6, 2020).

[8] *N.Y. State Nurses Ass’n v. Montefiore Med. Ctr.*, No. 20-cv-03122 (S.D.N.Y. Apr. 20, 2020). On May 1, 2020, the district court dismissed the New York State Nurses Association’s claim, finding that

the court did not have subject-matter jurisdiction to grant injunctive relief pending the parties' arbitration. *See id.* at ECF No. 33.

[9] *See, e.g., Rural Cmty. Workers Ass'n v. Smithfield Foods, Inc.*, No. 5:20-cv-06063 (W.D. Mo. Apr. 23, 2020) (asserting a public nuisance claim and seeking declaratory and injunctive relief against an essential business for alleged failure to comply with basic health and safety standards); *Corr. Officers' Benevolent Ass'n, Inc. v. City of New York*, No. 704991/2020 (N.Y. Sup. Ct. Queens Cty. Apr. 2, 2020) (correction officers' seeking injunctive relief); *N.Y. State Nurses Ass'n v. Montefiore Med. Ctr.*, No. 20-cv-03122 (S.D.N.Y. Apr. 20, 2020) (nurses' union seeking injunctive relief).

[10] *See supra* notes 7–10.

[11] *See* OSHA, *COVID-19 Standards*, <https://www.osha.gov/SLTC/covid-19/standards.html>; *Guidance on Preparing Workplaces for COVID-19*, OSHA 3990-03 2020, <https://www.osha.gov/Publications/OSHA3990.pdf>.

[12] *See, e.g.,* OSHA, *Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19)*, <https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>.

[13] *See, e.g., Albrecht v. Balt. & Ohio R. Co.*, 808 F.2d 329, 332 (4th Cir. 1987) (“In a negligence action, regulations promulgated under . . . [OSHA] provide evidence of the standard of care exacted of employers, but they neither create an implied cause of action nor establish negligence per se.”); *Ries v. Nat'l RR Passenger Corp.*, 960 F.2d 1156, 1164 (3d Cir. 1992) (“[V]iolation of the OSHA regulation was properly admissible as evidence of Amtrak's negligence”).

[14] N.Y. Workers' Comp. § 2(7).

[15] N.Y. Workers' Comp. §§ 2(15), 3(2-30).

[16] *DePaoli v. Great A & P Tea Co.*, 725 N.E.2d 1089, 1090 (N.Y. 2000) (citing *Wolfe v. Sibley, Lindsay & Curr Co.*, 330 N.E.2d 603, 606 (N.Y. 1975) (“[P]sychological or nervous injury precipitated by psychic trauma is compensable to the same extent as physical injury.”); *see also Kraus v. Wegmans Food Mkts., Inc.*, 67 N.Y.S.3d 702, 706 (3d Dep't 2017) (“For a mental injury premised on work-related stress to be compensable, ‘a claimant must demonstrate that the stress that caused the claimed mental injury was greater than that which other similarly situated workers experienced in the normal work environment.’”) (citation omitted).

[17] *Lerner v. Rump Bros.*, 149 N.E. 334, 335 (N.Y. 1925).

[18] *Middleton v. Cocksackie Corr. Facility*, 341 N.E.2d 527, 531 (N.Y. 1975).

[19] *Johannesen v. New York City Dep't of Hous. Pres. & Dev.*, 638 N.E.2d 981 (N.Y. 1994).

[20] Tex. Lab. Code Ann. § 401.011(34).

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- [21] *Bewley v. Texas Employers Ins. Ass'n*, 568 S.W.2d 208, 210 (Tex. Civ. App. 1978).
- [22] *See LaTourette v. W.C.A.B.*, 951 P.2d 1184, 1189 (Cal. 1998) (citation omitted).
- [23] *Id.* at 654 (citation omitted); *see also S. Coast Framing, Inc. v. Workers' Comp. Appeals Bd.*, 61 Cal. 4th 291, 301, 349 P.3d 141, 148 (2015) (“[I]t [is] enough that ‘ the employee’s risk of contracting the disease by virtue of the employment must be materially greater than that of the general public.’”) (citation omitted).
- [24] Alaska Enrolled SB241 § 15, akleg.gov/PDF/31/Bills/SB0241Z.pdf.
- [25] Minn. Stats. § 176.011(15)(f), <https://www.revisor.mn.gov/laws/2020/0/72/laws.0.1.0#laws.0.1.0>.
- [26] Wis. Stat. § 102.03(6), <https://docs.legis.wisconsin.gov/statutes/statutes/102.pdf>.
- [27] For example, the Illinois Workers Compensation Commission issued an Emergency Amendment that provides that an occupational disease or incapacity from exposure to COVID-19 “will be rebuttably presumed” to have arisen out of and in the course of a COVID-19 first responder or front-line worker’s employment and will be “rebuttably presumed” to be causally connected to that employment. 50 Ill. Adm. Code 9030, Amended by emergency rulemaking at 44 Ill. Reg. _____, effective April 16, 2020, for a maximum of 150 days, https://www2.illinois.gov/sites/iwcc/news/Documents/15APR20-Notice_of_Emergency_Amendments_CORRECTED-clean-50IAC9030_70.pdf
- [28] Letter from Chair Rodriguez to Carriers and Payers of Workers’ Compensation, Apr. 15, 2020, http://www.wcb.ny.gov/content/main/TheBoard/WCB_COVID19_LtrtoCarriers.pdf.
- [29] *See Workers’ Compensation Insurance Rating Board, Hearing Date Set for July 1, 2020 Special Regulatory Filing* (Apr. 21, 2020), <https://www.wcirb.com/news/hearing-date-set-july-1-2020-special-regulatory-filing>.
- [30] For example, domestic workers working fewer than forty hours a week, members of the clergy, and municipal employees whose municipalities have not elected to participate in workers’ compensation are not covered. *See* N.Y. Workers’ Comp. § 3.
- [31] Office of the Commissioner Representing Employers, Texas Workforce Commission, *Especially for Texas Employers, Workers’ Compensation, available at* https://www.twc.texas.gov/news/eft/workers_compensation.html.
- [32] *Id.*
- [33] N.Y. Workers’ Comp. § 11.
- [34] N.Y. Workers’ Comp. § 29(6).

- [35] *Thompson v. Grumman Aerospace Corp.*, 585 N.E.2d 355 (N.Y. 1991).
- [36] *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 210, 214 (2d Cir. 1987) (“Dismissal of all personal injury and related wrongful death claims against the Regents was required because the Hawaiian compensation statute provides the exclusive remedy against fellow employees for work-related injuries.”).
- [37] *See Rural Cmty. Workers Ass’n*, *supra* note 10.
- [38] *Acevedo v. Consol. Edison Co. of New York*, 596 N.Y.S.2d 68, 71 (1st Dep’t 1993).
- [39] *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 750 N.E.2d 1097, 1104 (N.Y. 2001).
- [40] *Agolia v. Benepe*, 924 N.Y.S.2d 428, 432 (2d Dep’t 2011); *see also Trujillo v. Ametek, Inc.*, No. 3:15-CV-1394-GPC-BGS, 2015 WL 7313408, at *7 (S.D. Cal. Nov. 18, 2015) (“The general rule is that public nuisance actions must be brought by government officials. . . . However, a private party may bring a public nuisance action where the nuisance is ‘specially injurious’ to the private party, beyond the harm caused by the nuisance to the general public.”).
- [41] *See, e.g., Burns Jackson Miller Summit & Spitzer v. Lindner*, 451 N.E.2d 459, 468–69 (N.Y. 1983) (dismissing nuisance claim by law firms seeking lost profit damages resulting from closure of transit system because harms caused by closure were so widespread all businesses suffered similar damage); *Venuto v. Owens-Corning Fiberglass Corp.*, 22 Cal. App. 3d 116, 123–24 (1971) (rejecting public nuisance claim brought by plaintiffs who claimed that air pollution from a fiberglass manufacturing plant aggravated their respiratory disorders).
- [42] *Lauria v. Donahue*, 438 F. Supp. 2d 131, 141 (E.D.N.Y. 2006).
- [43] *Id.*; *see also Gagliardi v. Trapp*, 633 N.Y.S.2d 387, 388 (2d Dep’t 1995) (“[T]he defendants’ conduct amounted, at most, to gross negligence or reckless conduct. The plaintiff’s remedy for such a wrong is that provided in the Workers’ Compensation Law.”).
- [44] *Pereira v. St. Joseph’s Cemetery*, 864 N.Y.S.2d 491, 492 (2d Dep’t 2008) (citations omitted).
- [45] *Forjan v. Leprino Foods, Inc.*, 209 F. App’x 8, 10 (2d Cir. 2006) (citing *Acevedo*, N.Y.S.2d at 68 (exception did not apply where employer had sent workers to clean up after an explosion without warning them of toxic asbestos); *Briggs v. Pymm Thermometer Corp.*, 537 N.Y.S.2d 553 (2d Dep’t 1989) (exception did not apply where employer concealed and/or misrepresented the risk of toxic exposure to mercury, cleaning fluids and solvents).
- [46] Cal. Lab. Code § 3602.
- [47] *Foster v. Xerox Corp.*, 707 P.2d 858 (Cal. 1985); *see also Johns-Manville Prod. Corp. v. Superior Court*, 612 P.2d 948 (Cal. 1980) (pre-dating the enactment of Cal Lab. Code § 3602) (“[I]f

the complaint alleged only that plaintiff contracted the disease because defendant knew and concealed from him that his health was endangered by asbestos in the work environment, failed to supply adequate protective devices to avoid disease, and violated governmental regulations relating to dust levels at the plant, plaintiff's only remedy would be to prosecute his claim under the workers' compensation law.”).

[48] *Rodriguez v. United Airlines, Inc.*, 5 F. Supp. 3d 1131, 1138-39 (N.D. Cal. 2013).

[49] Tex. Lab. Code Ann. § 408.001(b).

[50] *Arnold v. Renken & Kuentz Transp. Co.*, 936 S.W.2d 57, 58 (Tex. App. 1996).

[51] N.Y. Workers' Comp. § 11.

[52] *See, e.g., Rubeis v. Aqua Club Inc.*, 821 N.E.2d 530 (N.Y. 2004) (allowing impleaded third-party complaints and awards against employers upon determining that plaintiffs had suffered from grave injuries).

[53] *See, e.g., DiVetri v. ABM Janitorial Serv., Inc.*, 990 N.Y.S.2d 496, 496 (1st Dep't 2014) (finding that owner of office building and the janitorial company contracted by the office building could be liable for the dangerous condition in the lobby that caused the plaintiff to slip and injure herself); *Pintor v. 122 Water Realty, LLC*, 933 N.Y.S.2d 679, 679 (1st Dep't 2011).

[54] *Commissioners of State Ins. Fund v. Fox Run Farms, Inc.*, 600 N.Y.S.2d 239, 239 (1st Dep't 1993) (“[I]ndependent contractors are not employees covered by the Workers' Compensation Law.”).

[55] *Thompson v. Grumman Aerospace Corp.*, 585 N.E.2d 355 (N.Y. 1991).

[56] In a previous alert, Gibson Dunn outlined issues for companies to consider in implementing responses to COVID-19. *See* Gibson Dunn's March 16, 2020 Client Alert, U.S. Employment Law Considerations for Companies Responding to COVID-19, *available at* <https://www.gibsondunn.com/us-employment-law-considerations-for-companies-responding-to-covid-19/>. Gibson Dunn has also outlined issues for companies to consider in planning how to bring employees back to work. *See* Gibson Dunn's April 30, 2020 Webcast, Returning to Work: Health, Employment and Privacy Considerations and Constraints as Businesses Resume Post-Quarantine Operations in the U.S., *available at* <https://www.gibsondunn.com/webcast-returning-to-work-health-employment-and-privacy-considerations-and-constraints-as-businesses-resume-post-quarantine-operations-in-the-u-s/>.

[57] *See supra* Section II. There have also been calls to create specific safe-harbor provisions for businesses that comply with such guidelines. *See, e.g.*, U.S. Chamber of Commerce, “Implementing a National Return to Work Plan” (Apr. 13, 2020), *available at* https://www.uschamber.com/coronavirus/implementing-national-return-to-work-plan?utm_source=email&utm_medium=enl&utm_campaign=laboroflaw&utm_content=20200416&utm_term=law#liability.

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[58] See Rachel Abrams, *Spectrum Employees Are Getting Sick Amid Debate Over Working From Home*, The New York Times (Apr. 21, 2020), <https://www.nytimes.com/2020/04/21/business/spectrum-employees-coronavirus.html>.



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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 Labor and Employment Group, or the following authors:

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