

COVID-19: Plan Now for Bringing Back Your Workforce – Part III

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In the first two parts of our series we described strategies for managing COVID-19 risks as businesses reopen, and employers, employees, and customers reconnect. These strategies include observance of [OSHA's Guidance on Preparing Workforces for COVID-19](#) (Part I) and adopting [Infectious Disease Preparedness and Response Plans](#) (Part II). In this, our third and final installment, we consider the types of liabilities that employers will confront as they decide when and how quickly to bring back their workforce. We also explain why the [OSHA Infectious Disease Preparedness and Response Plan](#) is your best strategy for controlling that risk.

Workers' Compensation Liability

Generally speaking, workers' compensation insurance provides a limited benefit to employees in case of injury in exchange for a waiver of civil liability. This rule applies to employees who contract COVID-19 while at work and because of work. Thus, in most states, workers' compensation is the sole remedy for employees who contract COVID-19 at work – they may not bring civil actions against their employer regardless of actual or claimed fault of the employer.

The only exceptions exist in states that permit civil claims in cases involving “willful misconduct” or “gross negligence” or the like. However, such extreme fault will be very difficult to prove (although easy enough to allege) both in terms of causation – was the virus contracted at work? – and fault – should the employer have acted differently?

Fortunately, Maine does not have such an exception, although Massachusetts allows double benefits if the employer engaged in “serious and willful misconduct.”

The workers' compensation challenge, of course, will always be proving that the virus was more likely than not contracted at work. In some instances, such as a health care worker who directly cares for an infected patient, causation may be reasonably clear. And, if it is proven that an employee with COVID-19 from any source infects a number of coworkers, all such workers will be covered by workers' compensation assuming causation is proven.

However, causation in most instances won't be this clear, and questions will arise as to whether the employee contracted COVID-19 from a family member, friend, on the bus to work, out shopping, or

from some unknown community exposure. Remember, the question is not whether the employee *could* have contracted the illness at work, but whether he or she *did*.

This is not to say that each COVID-19 case will involve years of litigation and discovery. We expect that most insurers and employers will pay workers' compensation benefits, at least without prejudice (meaning without accepting legal responsibility), based on a showing that the employee was exposed to the virus at work and soon thereafter developed symptoms. Payment of such claims will be made easier because most cases will involve no more than a few weeks of lost time and some medical bills, with disputes reserved for those few cases in which causation is suspect and the disease causes hospitalization (or worse).

Burdens of proof by state

Because of the difficulty of proving causation, as well as public policy concerns, some states have relaxed or are attempting to relax burdens of proof for COVID-19 cases. At present, no fewer than 23 states have enacted or are considering relaxed burdens of proof or presumptions of causation for front-line workers. Vermont and Massachusetts are considering such bills and New Hampshire Governor Sununu signed an Executive Order on April 24, 2020 that created a rebuttable presumption that a first responder who contracts COVID-19 did so because of work.

Maine has not jumped on this bandwagon, although the Maine Legislature has enacted presumptions of compensability for some high-risk professions – for example, hepatitis and tuberculosis for EMTs, and lung disease, heart disease, and cancer for firefighters.

Reporting injuries or illnesses

What should you do when an employee tests positive or has symptoms and is sent home? The best practice is to notify your workers' compensation insurer so that the appropriate filings can be made, even if only as a precaution. In Maine, 524 First Reports of Injury for COVID-19 had been filed as of the middle of this week. This includes cases involving exposure to a person with COVID-19 even if the employee has not yet been tested or is not yet symptomatic. Of these, 453 were lost time First Reports, meaning the employee was sent home to quarantine or for treatment.

It is best to get these claims into the system even if the employee is still being paid and even if the employee is receiving benefits under the Families First Coronavirus Relief Act in the form of enhanced sick leave or enhanced FMLA with pay, or under the CARES Act with enhanced unemployment. Often, due to the workers' compensation maximum compensation rate, which varies from state to state, employees may receive more money under one or more of these programs than under workers' compensation, so many, or indeed most of the claims pending may never be pursued.

Other claims by employees

It is inevitable that employers will be confronted with various statutory claims brought by employees as businesses adapt to the new normal. A discussion of these theories exceeds the scope of this alert, but we remind employers to think about leave rights under the Family and Medical Leave Act (FMLA), accommodation rights under the Americans with Disabilities Act (ADA), statutory whistleblower protection claims for when employees inevitably assert that more should be done to prevent unsafe working conditions, OSHA retaliation claims, and the National Labor Relations Act

which protects employees speaking out among themselves or publically about working conditions (for example, use or nonuse of PPE).

Liability to Third Parties

Of equal concern to employers is liability to non-employees. As of this writing, approximately 900 COVID-19-related lawsuits have been filed nationwide. While about one-third of these concern prison conditions, that leaves over 600 lawsuits for things like false advertising (emergency suppliers), breach of contract (colleges that switched to online and did not refund tuition), emotional distress (cruise lines), wrongful death (retailers), negligence (nursing homes), denial of insurance coverage (insurance carriers) and denial of hazard pay (governments). This list is not exhaustive, and the legal theories will continue to multiply in the weeks and months ahead. For most employers whose businesses are not directly involved in the COVID-19 response, the primary concern will likely relate to claims of negligent transmission. A persistent fear we are hearing: a customer claims to have been infected, either at your location or by one of your employees working at theirs (e.g., at someone's home, or making a delivery).

An employer that follows the recommendations in our previous alerts and related [webinar](#) – including in particular by providing its employees with protocols for off-premises work – is doing all it can to minimize the spread of the coronavirus and so the employer's liability.

In theory, an employer could request that customers sign waivers of liability, but use of such waivers will seldom make business sense and we generally do not recommend them. We strongly discourage employers from agreeing to waive anything unless as part of a fully mutual agreement to do so. Even then, the risks for each party should be similar for such an agreement to make sense.

Finally, as the news changes from day to day, we will all keep an eye on Washington to see if further action by Congress includes limitations on employer liability.

The OSHA Plan is the Heart of Your Defense Strategy

By now, the importance of having an Infectious Disease Preparedness and Response Plan should be readily apparent. This plan:

- Reduces the likelihood that the coronavirus will invade your workplace
- Reduces the likelihood that if it does, it will spread
- Satisfies your obligation to comply with OSHA's General Duty Clause
- Creates common-sense, effective infection control measures that your employees will understand and follow
- Helps your employees be confident that they will be safe at work
- Enables you to show customers, vendors, the public, and the authorities that you are operating a safe workplace
- Satisfies your obligation with respect to compliance with state requirements for operating during the pandemic

- Meets the duty to the extent you have a duty of care to third parties with respect to the coronavirus

Creating a plan that reflects and controls the risks of your particular workplace is the single most important step you can take to orchestrate a successful return of your workforce.

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