

Safer At Home Overruled – Is It Business As Usual?

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Part I of Our Business Liability Series on Returning to Work

On May 13, 2020, the Wisconsin Supreme Court ruled the Secretary-designee of the Department of Health Services (DHS) failed to follow emergency rule procedures and exceeded her authority when she issued Emergency Order #28, ordering everyone to stay home, closing all “non-essential” businesses, prohibiting private gatherings of any number of people who are not part of a single household, and forbidding all “non-essential” travel.[1] The Court declared Emergency Order #28 “unlawful, invalid, and unenforceable.”

The Court declined the Legislature’s request to stay implementation of its order for a short period of time so the Legislature and DHS could agree upon and issue appropriate guidelines to reopen the economy. This leaves Wisconsin businesses without any state-sanctioned administrative rules or legislative guidance as to when or how to reopen for business. Can a business simply open its doors and declare business as usual? Sen. Mitch McConnell predicts an “epidemic of lawsuits” as businesses reopen, and the U.S. Chamber of Commerce is lobbying for legislation that offers businesses certain protection from liability.[2] These concerns highlight the very real danger of conducting business as usual, and the risk arises on several fronts.

Common-Law Negligence Actions

People and entities owe others a duty to use ordinary reasonable care under the circumstances.[3] In general, a business may be subject to liability for physical harm caused to frequenters if the business knows of, or by the exercise of reasonable care would discover, a dangerous condition present in the business premises, and fails to exercise reasonable care to protect invitees against the danger.[4] If a person or entity violates this duty and this breach results in injury to another, the business may be liable for the resulting damages. In the context of a business reopening, this generally requires, as a prerequisite to imposing liability, that the entity have had actual or constructive notice of the risk-creating condition. However, the risks attendant to declaring “business as usual” have been the overwhelming topic of discussion since early March and led to the declaration of a public health emergency of international concern by the World Health Organization, a national emergency by President Donald Trump and a public health emergency by Governor Evers.[5]

These risks have been underscored by the nation’s top infectious-disease expert, Dr. Anthony Fauci, as recently as May 12, 2020 when he testified before a Senate committee and warned of “really

serious” consequences of suffering, death and deeper economic damage if state and local officials lift stay-at-home orders too quickly.[6] Dr. Fauci may have been talking about greater national consequences, but at the ground level businesses reopening to the public are exposed to liability if frequenters become ill because the business failed to take steps identified as safety measures in the recently invalidated Emergency Order #28. It would be difficult, if not impossible, for a business to declare that it did not have notice that “business as usual” was creating a risk.

Statutory Premise Liability

Wisconsin legislature long ago determined that every employer must furnish a place of employment that is safe for employees and frequenters.[7] The employer is required to adopt and use methods and processes reasonably adequate to render places of employment safe and “do every other thing reasonable necessary to protect the life, health, safety, and welfare of employees and frequenters.[8] This statute creates liability for an owner for structural defects and unsafe conditions associated with the structure of the building.[9] It remains to be tested whether a successful argument can be made that COVID-19 is an unsafe condition associated with the structure of a building.

Misrepresentation

Businesses also should be careful about any representations made to employees or frequenters regarding the safety of their premises/practices. Misrepresentation of the safety measures taken or the effectiveness of those safety measures to convince employees and patrons to return may be negligent conduct.[10] The consequences will be more severe if the business is conscious the statement is false.[11]

Workplace/Employment

If employers do not follow the CDC guidelines, are they exposed to claims to regulatory agencies for failure to comply with workplace safety requirements? The answer to this and other related workplace/employment factors will be addressed in the second part of our Business Liability Series.

Uncertainty May Limit Defenses

Emergency Order #31, dubbed the Badger Bounce Back, and subsequent “Interim Orders to Turn the Dial” offered guidance to various businesses on a phased reopening. Although not a blanket indemnification, a business following these guidelines could argue it was using the methods and following the processes recommended by DHS as reasonably necessary to protect employees and frequenters. The decision by the Wisconsin Supreme Court eliminates the State mandate that businesses in Wisconsin follow any methods or processes, potentially undermining the ability of the business to point to these methods or processes as a defense to liability.

Local governments immediately stepped into the void created by the Wisconsin Supreme Court’s decision. As of the issuance of this article, multiple municipal and county governments, including Brown, Dane, Kenosha, Rock and parts of Milwaukee County and the Cities of Appleton, Madison, Milwaukee and Racine, independently issued local Safer at Home orders. [[Businesses Must Be Aware of Local Safer At Home Orders, Including Those in Brown, Dane, Kenosha, and Rock Counties, Parts of Milwaukee County, and the Cities of Appleton, Madison, Milwaukee, and Racine \(May 14, 2020\)](#)], [[COVID-19 Public Health Plan for Suburban Milwaukee County](#)]. In the absence of a statewide mandate, this patchwork of orders creates greater uncertainty as to what will constitute

“ordinary care” under the circumstances.

Possible Exposure for Taking Action

On the other hand, now that the Wisconsin Supreme Court has declared Emergency Order #28 invalid and unenforceable, does a business risk liability if it imposes restrictions or other safety measures on its employees or customers? Can businesses limit the number of people allowed on premises at any one time? Require employees or customers to keep socially distance or wear face masks when entering the premises? Set up a screening station? Many businesses were relying upon the guidance issued by DHS in Emergency Order #31 to impose these restrictions. What is the impact of the Wisconsin Supreme Court’s order on Emergency Order #31 and the succeeding orders to “turn the dial”? If DHS did not have authority to order people to stay home, to close “non-essential” businesses, or prohibit private gatherings of people who are not part of a single household, how can DHS set guidelines to re-establish travel, open businesses or permit gatherings?

In the absence of legislative guidance, actions taken by employers to limit the spread of COVID-19 in the workplace may trigger claims or regulatory actions based on theories of discrimination, other unlawful employment practices or invasion of privacy. [See our April 28 article addressing employee health and safety, employee selection and accommodation: Post COVID-19 Return to Work.]

Recommendation

“Business as usual” exposes businesses and employers to liability from multiple sources. Ultimately, to avoid liability, businesses and employers should follow federal, state and local guidelines. The Wisconsin Supreme Court’s decision invalidating Emergency Order #28 requires businesses and employers to examine the guidelines issued by the Center for Disease Control as well as all county and local orders. Businesses should adhere to these guidelines to the best of their ability and clearly advise employees and frequenters of any restrictions/requirements put in place as safety measures. Businesses also should inform employees and frequenters of the risks they assume for their own failure to comply with these restrictions/requirements. Finally, businesses must monitor the effect of the safety measures they implement and be ready to adapt to ever changing guidelines and changing public health concerns.

[1] Wisconsin Legislature v. Palm, No. 2020AP765-OA, 2020 WI 42.

[2] Scott Horsley. “Businesses Liability: When is it safe for people to go back to work,” <https://www.npr.org/2020/05/06/851173956/businesses-liability-when-is-it-safe-for-people-to-go-back-to-work>. (May 6, 2020).

[3] Restatement (Second) of Torts § 282.

[4] Restatement (Second) of Torts § 343.

[5] DHS Emergency Order #34.

[6] Lauran Neergaard & Ricardo Alonso-Zaldivar. “Fauci warns of damage, death if US reopens too soon” Milwaukee Journal Sentinel, May 13,2020 at 1A (AP News).

[7] Wis. Stat. sec. 101.11(1).

[8] Wis. Stat. sec. 101.11(1).

[9] Cristiano v. Heritage Relocation Services, Inc., 2014 WI App 75, 355 Wis.2d 403, 851 N.W. 2d 77.

[10] Restatement (Second) of Torts § 304.

[11] Restatement (Second) of Torts §§ 310 & 311.

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