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Avoiding Endless Liability From ‘Take Home’ COVID Claims

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You’ve just been informed that an employee who apparently contracted COVID-19 from an exposure in your workplace brought the virus home, and now their spouse, who is in a high-risk category, has contracted the virus and is in the hospital. Do you as the employer face potential liability for the spouse’s illness?

More than two dozen so-called take-home COVID-19 lawsuits have been filed across the country, including against some of the largest employers in the U.S. This alarming pattern has prompted trade groups to warn employers of the potential for lawsuits stemming from COVID-19 infections filed not only by workers’ family and friends, but by anyone infected by that circle of people, creating seemingly endless chains of liability for employers. Some states have enacted laws shielding employers from such suits, but where that is not the case, the legal theories and procedural paths under which these suits have proceeded vary — including some being brought in state courts, some in federal courts, and others brought under claims within the workers’ compensation system.

The issue is currently being tested in California, where the U.S. Court of Appeals for the Ninth Circuit certified questions to the California Supreme Court on April 21, seeking guidance on the state’s laws. The case, Kuciemba v. Victory Woodworks Inc.,[1] arose after Robert Kuciemba allegedly was exposed to COVID-19 through his work at one of his employer’s job sites.

According to Robert Kuciemba and his wife, Corby Kuciemba, Victory “knowingly transferred” workers from an infected construction site to the job site where Kuciemba was assigned without following the safety procedures required by the San Francisco health order. After being “forced to work in close contact” with these workers, he developed COVID-19, which he then brought home. His wife is over 65 years old and was at high risk from COVID-19, and the family had been careful to limit its exposure to the virus, with the exception of Robert Kuciemba going to work. Corby Kuciemba subsequently tested positive for the disease, and was hospitalized for over a month after developing severe symptoms.

The Kuciembas filed suit, alleging that Victory caused Corby Kuciemba’s injuries by violating the city’s health orders, and negligently allowed COVID-19 to spread from its worksite into their household. The U.S. District Court for the Northern District of California dismissed the case, which was then appealed to the Ninth Circuit.

After hearing argument, the Ninth Circuit turned to the California Supreme Court to answer two questions of state law: First, whether Corby Kuciemba's illness was an injury that was derivative of Robert Kuciemba's work-related injury, and if so, whether her claims would be subject to the exclusive jurisdiction of the Worker's Compensation Act; and second, assuming the WCA is not the exclusive remedy, whether the employer owed a duty to the households of its employees to exercise ordinary care to prevent the spread of COVID-19.[2]

The WCA provides the exclusive remedy for most workplace injuries. In exchange for a relatively swift and certain payment of benefits for industrial injuries without having to prove fault, employees give up a wider range of damages potentially available in tort claims through the civil court system.

Under the derivative injury doctrine, the WCA is also the exclusive remedy for claims by third parties deemed collateral to or derivative of an employee's work-related injuries.

Thus, the question posed becomes whether a third party who purportedly suffered injury arising from an employee's workplace COVID-19 illness must also seek redress through the state workers' compensation system, or if he or she may sue the employer in court for what may be a wider range of damages. These questions have not been squarely answered by the California Supreme Court — although, as noted by the Ninth Circuit, in a somewhat analogous situation, California courts have allowed suits against employers whose negligence purportedly led to their employees transporting asbestos fibers home to their families to proceed in court rather than through the workers' compensation system.

While the Kuciemba case was pending, the California Court of Appeal, Second Appellate District, ruled in another case, See's Candies Inc. v. Superior Court,[3] that the derivative injury doctrine does not bar third-party claims related to COVID-19.

Under a similar fact pattern, the court allowed the negligence case to go forward, while noting that the plaintiff would still need to prove that the employer owed a duty of care to nonemployees infected with COVID-19 due to an employee contracting the virus at work. Acknowledging that an analysis of this duty "appear[s] worthy of exploration," the Second Appellate District — quoting the California Supreme Court's 2016 decision in Kesner v. Superior Court — said the analysis would include an assessment of "'public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief.'" The California Supreme Court declined to review the See's case, meaning that its holding still stands.

The California Supreme Court has not announced whether it will respond to the Ninth Circuit's certified questions in the Kuciembas' case. In the meantime, employers must assume they are not shielded from these take-home cases, and therefore cannot and should not automatically rely on the exclusive remedial scheme provided under the workers' compensation system to cover such claims. Nor are they necessarily shielded from COVID-19 lawsuits brought by employees' family members, and perhaps others, in the courts.

Workplace Safety Measures

The question driving nearly all of these claims is whether the employer took reasonable measures, based on then-existing guidance, to prevent the spread of COVID-19 in the workplace.

Accordingly, while many states are shifting to fewer required protections, workplace safety has never been more critical, and employers must continue to take steps to avoid employee exposure to

COVID-19, including implementing or updating COVID-19 safety protocols. The timing and implementation of precautionary safety measures will likely be critical evidence in defending against such claims.

Deciding which actions to take and when is no simple task in this constantly changing environment. Prudent workplace safety practices employers should implement include the following.

Stay updated on safety guidance.

Remain updated on and follow guidance for businesses issued by the Centers for Disease Control and Prevention, the U.S. Department of Labor, the Occupational Safety and Health Administration, and state and local executive orders — and ensure workplace safety policies and procedures are aligned.

Specifically, employers should consult the CDC's guidance for businesses, including best practices for social distancing, cleaning and disinfecting the workplace, and quarantining employees who have been exposed to the virus, even where states have lifted all mandates.

Utilize OSHA's most recent guidelines.

Utilize OSHA's most recent guidelines when creating return-to-work plans and policies.

Notably, while the guidance is in the form of non-mandatory recommendations, OSHA has stated that an organization's good faith efforts to comply with its recommended guidance will be taken into strong consideration when determining whether to issue citations for violating the overarching requirement to maintain a safe work environment, known as the general duty clause.

Such citations could also be used as evidence of an employer's failure to comply with its duty of care in a civil lawsuit.

Educate employees.

Continue to educate your employees about the symptoms of COVID-19 and urge them to seek medical attention if symptoms appear.

Also, check in with isolated sick employees to ask about their health. Employees with whom employers engage will be less likely to seek litigation against their employer, and their family will appreciate this courtesy.

Notify employees about confirmed cases.

Inform employees of confirmed cases of COVID-19 in the workplace, and err on the side of transparency. Although no case law currently exists, OSHA may ultimately determine a failure to notify employees of a confirmed COVID-19 case is a violation of OSHA's general duty clause.

Conclusion

As is often the case in dealing with workplace disputes, the best way to defend against a potential take-home COVID-19 lawsuit is to avoid one altogether. Consequently, the more effort employers

make toward protecting workers from the virus, the stronger the defenses will be against any potential litigation.

FOOTNOTES

[1] Kuciemba v. Victory Woodworks, Inc., N.D. Cal. 3:20-cv-09355, (N.D. Cal. 2020).

[2] Kuciemba v. Victory Woodworks, Inc., No. 21-15963 (9th Cir. Apr. 21, 2022).

[3] See's Candies, Inc. v. Superior Court, 288 Cal. Rptr. 3d 66 (Cal. Ct. App. 2021).

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