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COVID-19: REOPENING BUSINESSES, POTENTIAL PERSONAL INJURY THEORIES, AND MITIGATING RISKS

June 8, 2020

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REOPENING BUSINESS IN THE WAKE OF COVID-19

As federal, state, and local regulators issue guidelines allowing businesses to reopen during the coronavirus (COVID-19) crisis, businesses face the risk of personal injury claims by individuals who contract the virus. While employee lawsuits are likely, businesses may also face litigation from customers and family members of employees. Indeed, personal injury lawsuits have already been initiated against various businesses, including meat processing plants, educational institutions, and rehabilitation and nursing home facilities. This White Paper explores common theories of liability that we anticipate will be a focus of this potential new litigation and sets forth recommendations for businesses seeking to mitigate their exposure to such liability.

RISK OF LITIGATION

The specific risks of litigation facing businesses reopening during the COVID-19 crisis will vary by state. That said, there are common claims we expect to see litigated nationally as a consequence of the pandemic. As occurred following previous infectious disease outbreaks, customers, employees, and employee next-of-kin are likely to pursue claims against businesses for negligence based on principles of premises liability and failure to warn.

Premises Liability Claims

With respect to customers, businesses should be prepared for lawsuits in which customers claim to have contracted COVID-19 from their premises. In such a case, premises liability principles provide that a business can be liable to a "business invitee" (i.e., a customer) for an unreasonably dangerous condition or for the failure to warn of that condition. For example, in *Tynes v. Buccaneers Ltd. P'ship*,[1] a retired NFL football player brought a premises liability/failure to warn claim against the Tampa Bay Buccaneers after he contracted Methicillin-resistant Staphylococcus aureus (MRSA) at a team training facility. The case eventually settled, but not before Tynes was allowed to proceed on his allegations that the team had failed to maintain the training facility in a reasonably safe condition and had failed to give him "timely notice and warning of latent and concealed perils."[2]

Attempts by Employees to Avoid the Exclusive Remedy of the Workers Compensation Acts

It is also foreseeable that businesses will be subject to claims from their own employees who contract COVID-19 in the course of going to work. Generally, workers' compensation statutes bar employee tort claims arising from a workplace infection, but some states recognize an exception if an employee can show that the employer willfully or fraudulently concealed the risk of illness from them. In fact, a lawsuit asserting such claims was recently filed in the Philadelphia County Court of Common Pleas, *Benjamin v. JBS S.A., et al.* In *Benjamin*, plaintiffs filed a wrongful death and survival action on behalf of Enock Benjamin, who died from complications of COVID-19 after allegedly contracting the virus from working in his position at defendant's meat processing plant. The plaintiffs claim that Benjamin's direct employer, as well as the parent corporation, failed to take recommended safety precautions and "intentionally misrepresented the safety of the facility." Plaintiffs allege that defendants' carelessness, negligence,

[1] 134 F. Supp. 3d 1351 (M.D. Fla. 2015).
[2] Id. at 1354.

recklessness, and gross negligence caused Benjamin's illness, which ultimately led to his death. As evident from the allegations in *Benjamin*, cases such as these will hinge on plaintiffs' ability to establish that the employer disregarded federal, state, and/or local guidelines on safe working conditions during COVID-19. Moreover, *Benjamin* illustrates that plaintiffs will also seek to avoid the workers' compensation bar by bringing claims against parent corporations of direct employers. In such cases, plaintiffs will need to show that the parent corporation, as opposed to an employee's direct employer, was the entity responsible for making safety policy decisions during COVID-19.

Claims by Employee Next-of-Kin

Businesses are likely to face third-party claims from family members of employees, if a family member contracts COVID-19 when an employee brings the virus home with them from work. Indeed, previously courts have allowed negligence claims brought by employee next-of-kin who contracted diseases traceable to the employer's premises.[3] Similarly, several state court decisions have imposed on employers a duty to warn employee next-of-kin about an employee's risk of asbestos exposure.[4] By analogy to the asbestos exposure cases, courts could impose a duty to warn on employers whose employees risk COVID-19 exposure.

Available Defenses

In response to the claims described above, businesses are not without recourse. Ideally, federal and state legislation will be passed, or emergency orders issued, that provide businesses with protection from such claims. On the federal level, the Senate Judiciary Committee is considering whether Congress ought to broadly immunize employers from COVID-19 lawsuits as the country reopens. The federal Public Readiness and Emergency Preparedness Act (PREP Act) already provides broad immunity from liability for claims of loss (including death, personal injury, business disruption, and property damage) for covered persons providing covered countermeasures for COVID-19, including testing, treatment, and personal protective equipment when those countermeasures are employed or distributed in coordination with federal, state, or local government. In addition, President Donald Trump recently issued an executive order under the Defense Production Act (DPA) declaring beef, pork, and poultry processors critical infrastructure, requiring them to remain open during the COVID-19 crisis. Under the DPA, these food processors may be immune from liability for breach of contract or personal injury. Moreover, on the state level, Utah Governor Gary Herbert signed a bill earlier this month making business owners "immune from civil liability for damages or an injury resulting from exposure of an individual to COVID-19" unless they displayed "willful misconduct; reckless infliction of harm; or intentional infliction of harm." In fact, several states have already issued emergency orders providing immunity protection against tort liability for health providers.

Even in the absence of immunity legislation, however, an inherent challenge for any individual pursuing these claims will be proof of causation. Such proof will necessarily require that an individual show that their risk of contracting the virus came from the business/employer's premises, and not an alternative source of exposure. Given the apparent ease with which COVID-19 spreads among infected individuals,

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[3] *Bolieu v. Sisters of Providence in Washington*, 953 P.2d 1233 (Alaska 1998) (extending a hospital's duty of care to the husbands of two employee nursing assistants who contracted staph infections from their wives upon finding that the husbands' infections were foreseeable, and that extending a duty to them would not impose an undue financial burden on the hospital); *Redditt v. BellSouth Telecommunications*, No. 3:09-CV-21, 2009 WL 1659367, at *1 (N.D. Fla. June 11, 2009) (allowing a third-party negligence claim by an employee's spouse against the call-center employer that experienced an outbreak of MRSA on its premises).

[4] See, e.g., *Ramsey v. Georgia S. Univ. Advanced Dev. Ctr.*, 189 A.3d 1255, 1275 (Del. 2018); *Kesner v. Super. Ct.*, Nos. S219534, S219919 (Cal. Dec. 1, 2016); *Stegemoller v. AC&S, Inc.*, 767 N.E.2d 974 (Ind. 2002).

including individuals who are asymptomatic, proving such causation could be difficult for any potential plaintiff.

Further, if businesses follow the proper guidelines and directives on safely reopening during this time, one of their most effective defenses to these lawsuits will be that individuals "assumed the risk" of exposure to COVID-19 when they came on the premises. The assumption of risk defense would be particularly strong for businesses that explicitly warn of COVID-19 exposure and require customers to sign a waiver/release prior to entering.

Yet, despite the challenges potential plaintiffs face in bringing these claims, the COVID-19 pandemic has led and will continue to lead to new litigation against businesses.

REDUCING THE RISK OF CLAIMS

Businesses can reduce the risk of personal injury lawsuit by continuing to follow the guidance and directives set forth by federal—especially the Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA)—state, and local governmental and health officials as to preparing workplaces and businesses for COVID-19. Indeed, some governments are considering providing a safe harbor (retroactive to the start of the pandemic) for any party that was maximally compliant with the existing federal or state guidance at the time of the alleged tort. As such, being able to show a significant effort built around analyzing and complying with those standards may help businesses establish the potential safe harbor defense.

Retailers should also consider placing conspicuous Notice/Warning/Disclaimer signs emphasizing that patrons engage in social distancing while on the premises, use a face covering and wash their hands after leaving the premises, and in fact, many state and local orders require such postings. Risk-averse retailers may also choose to include language on such signs as to the impossibility of guaranteeing complete protection from COVID-19 for their patrons.

All businesses should consider adding a COVID-19 provision to their standard terms and conditions, which includes appropriate Disclaimer, Acknowledgment of Risk, and Limitation of Liability statements.

Non-consumer businesses should consider including in their contacts with their clients and vendors an Indemnification provision requiring their clients and vendors to indemnify the business from COVID-19 personal injury claims by their employees, customers, business invitees, and patrons. Similarly, a non-consumer business may request its clients and vendors make it an additional insured under their insurance policies.

Finally, service companies should consider including a Limitation of Liability provision in their service contracts to guard against claims by their clients that they caused their operations to shut down by allowing their facilities to be infected with COVID-19. In this regard, a mutual Limitation of Liability provision stating that "neither party be liable to the other party for any loss of business, business interruption, consequential, special, indirect or punitive damages" may be helpful.

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