

## >> COVID-19 ALERT

### BACK TO WORK SERIES

# COVID-19: As Cases Continue to Spread, Will Court Cases Begin to Spread?

#### THE BOTTOM LINE

- >> As employees return to work, employers must increase precautions they take in connection with their workers' health and safety.
- >> Companies should closely follow guidance being issued and frequently updated by the CDC, OSHA, and other agencies, to protect themselves from civil liability on COVID-19 claims.
- >> Employers may be protected from some personal injury lawsuits by worker's compensation insurance and laws. However, employers may not be protected from civil lawsuits where worker's compensation laws do not cover COVID-19, or employers' actions or inactions deemed reckless, willful, intentional or otherwise egregious.

When the calendar turned from 2019 to 2020 a mere four months ago, few could have imagined that a novel coronavirus (COVID-19) outbreak would soon disrupt societies across the globe and upend the lives of millions of people.

While the coronavirus continues to spread across nations, much of the workforce finds itself confined at home while governments try to slow the transmission of the virus.

Not all Americans, however, have been able to #StayAtHome. "Essential" workers have bravely continued to report to work. In doing so, many have been exposed to the virus. Undoubtedly, employers will face legal challenges stemming from those workers who contract COVID-19 on the job and those who believe they did. Employers should brace for this risk to increase once states start reopening for business.

Below are potential employment claims likely to stem from the coronavirus pandemic, which may or may not be covered by workers' compensation insurance and, therefore, could be very costly. As this is a developing area of law that varies from state to state, employers should consult their legal counsel for the most up-to-date counsel applicable to them.

#### COVID-19 WORKERS' COMPENSATION CLAIMS: NOT LIKELY TO GO "VIRAL"

Workers' compensation insurance programs provide cash benefits and/or medical care on a no-fault basis for workers who are hurt or ill as a direct result of their jobs. Workers generally cannot sue their employers for negligence or personal injury except for certain exceptions that vary from state to state — which typically include an employer's intentional misconduct or fraudulent concealment of the source of the injury.

Workers' compensation usually applies to a disease-based claim only if the illness arose in the course and scope of employment and was caused by conditions peculiar to the employee's job.

Therefore, for most non-healthcare related industries, COVID-19 claims will not likely be compensable through the workers' compensation system because nothing inherent in employees' jobs makes them more likely to become ill.

By contrast, claims of certain healthcare professionals and first responders are more likely to be covered by workers' compensation laws. These workers' jobs expose them to

longer, more frequent exposures than the general population, increasing their likelihood of infection, and satisfying the “peculiarity” requirement. Several states have already proposed or introduced legislation to clarify that COVID-19 illnesses for these workers are presumed covered.

### A PANDEMIC OF CIVIL ACTIONS?

What recourse, if any, will the vast majority of American employees have if they become infected with the coronavirus on the job? Those who seek remedies will likely do so in court. In fact, the first of these cases has already materialized.

Wando Evans worked at Walmart in Evergreen Park, Illinois. Evans purportedly contracted COVID-19 at the store, and, on March 29, 2020, he passed away. His estate filed a wrongful death lawsuit against Walmart, accusing the retail giant of negligence and reckless misconduct. Evans’ estate claims that Walmart knew before Evans died that employees were showing COVID-19 symptoms but failed to implement recommended protective measures. The estate also alleges that Walmart failed to warn Evans and other employees that other individuals at the store were experiencing symptoms.

Allegations in the case include that Walmart’s conduct was wanton and

willful, likely both to enhance damages and avoid any argument by Walmart that workers’ compensation bars the claims, as simple negligence claims against an employer are typically barred by the workers’ compensation laws. It remains to be seen whether Wando Evans’ estate succeeds. Will a failure to take reasonable measures be deemed to go beyond simple negligence to allow employees to circumvent the potential workers’ compensation bar on civil lawsuits actions against an employer? If a state’s workers’ compensation system deems COVID-19 not to be compensable because it is inherently not a work-related illness, will that preclude any claim by an employee that the employee was infected at work?

Regardless, the *Evans* case is sure to be followed by similar claims throughout the country once a broadening population returns to work. The costs of litigation in these types of cases can be high, even if employers ultimately prevail.

### HOW TO REDUCE RISK TO YOUR BUSINESS

Here are six initial “best practices” to keep top of mind, both to help protect employees from illness and to help protect employers from claims and potential litigation.

#### 1. Safety First

To increase safety in the workplace during the coronavirus pandemic:

- >> Provide personal protective equipment (PPE) for employees.
- >> Consider shields or screens at major points of contact, such as reception.
- >> Enforce social distancing.
- >> Close or limit access to common areas, and have them cleaned and sanitized thoroughly and frequently.

#### 2. Keep Employees Home

Reasonable “work-from-home” accommodations are more important than ever. When an applicable stay-at-home order is lifted, begin by returning only a portion of your workforce at one time, while the rest work remotely. Also work to alternate days in the office among groups of employees.

#### 3. Screen Employees’ Health

The Equal Employment Opportunity Commission and several states and cities have confirmed that employers may implement temperature checks and coronavirus testing before allowing employees into the office. If onsite screening is adopted, set and adhere to a policy regarding how screening will be conducted, what temperature will

preclude an employee from entering the office, and consider hiring trained professionals to administer tests, or, if feasible (*e.g.*, for temperature measurement), require employees to self-administer the checks on location. Take reasonable steps to preserve privacy and confidentiality with respect to any such screening.

#### 4. Maintain Open Communication

Make sure employees know what measures you are taking to protect them. Be sure you stay aware of their health — while respecting their legal rights to privacy and confidentiality. Should an employee become ill or test positive, their identity cannot be shared with co-workers without their permission. The company can advise co-workers that someone on their floor, or in their work area, has tested positive, and that they, too, should consider being screened.

#### 5. Know the Law

Employers need to be up to speed on federal, state and local laws concerning sick leave, family and medical leave, and other employee rights in order to ensure their policies are compliant. See [here](#) and [here](#) for our recent updates.

#### 6. Stay on Top of Current and Evolving Guidelines

Recommendations from the Center for Disease Control (CDC), the Department of Labor (DOL), Occupational Safety and Health Administration (OSHA) and others, as well as state and local executive orders, continue to evolve, sometimes on a daily basis. Employers should assign individuals to keep up with changes and share them with management.

#### FOR MORE INFORMATION

Michael C. Lasky  
Partner/Co-Chair, Litigation  
212.468.4849  
[mlasky@dglaw.com](mailto:mlasky@dglaw.com)

Jessica Golden Cortes  
Partner, Labor & Employment  
212.468.4808  
[jcortes@dglaw.com](mailto:jcortes@dglaw.com)

Shira Franco  
Partner, Labor & Employment  
212.468.4839  
[sfranco@dglaw.com](mailto:sfranco@dglaw.com)

David S. Greenberg,  
Senior Attorney, Litigation  
212.468.4895  
[dgreenberg@dglaw.com](mailto:dgreenberg@dglaw.com)

or the D&G attorney with whom you have regular contact.

Davis & Gilbert LLP  
212.468.4800  
1740 Broadway, New York, NY 10019  
[www.dglaw.com](http://www.dglaw.com)  
© 2020 Davis & Gilbert LLP