COVID-19: REOPENING RESOURCES FOR BUSINESS—EXAMINING EMPLOYER LIABILITY SERIES—WORKERS' COMPENSATION AND CIVIL LIABILITY CONCERNS

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For essential industries and health care facilities that remained in operation during the COVID-19 pandemic as well as the various nonessential businesses that are now reopening across the country, the question of liability for employee exposure to COVID-19 looms large on employers' minds. Employers are trying to navigate the ever-changing regulatory landscape with differing sets of rules and liability standards applying in different parts of the country and, as of this writing, no uniform federal liability shield. Seemingly daily news of rising COVID-19 infections among healthcare workers and wrongful death lawsuits by family members of food service, retail, and food-processing plant workers serve to enhance employers' concerns about legal exposure. This article is the first in a series designed to explore the risks to employers of operating during the COVID-19 pandemic and will focus on workers' compensation and civil liability theories for employee exposure in the workplace.

Overall, employers should:

- Be aware of the limitations and exceptions under state workers' compensation statutes;
- Minimize the risk of employees' exposure to COVID-19 in the workplace;
- Remain up to date on all federal, state, and local directives regarding COVID-19; and
- Implement workplace guidelines addressing safety in the time of COVID-19.

WORKERS' COMPENSATION: AN EMPLOYEE'S “EXCLUSIVE” REMEDY

Most claims made by employees regarding potential workplace exposure to COVID-19 likely will fall under the various state workers' compensation schemes, which limit available remedies and bypass more costly civil litigation in resolving coverage disputes. Workers' compensation operates as an employee's exclusive remedy for an injury suffered on the job and generally prevents an employee from recovering both workers' compensation insurance benefits and civil damages. However, many employees may attempt to avail themselves of various exceptions to this exclusivity principle to pursue civil lawsuits—and the potential for compensatory and punitive damages—for personal injuries occurring in the workplace, in addition to exploring other avenues to assert claims related to contracting COVID-19.

Most states require private employers with one or more employees to carry workers' compensation insurance, and covered employees typically are eligible to receive workers' compensation benefits for injuries or occupational

illnesses that arise out of and in the course of employment. Workers' compensation laws are one potential protection against civil lawsuits by employees who contract an occupational disease, as they typically operate as the exclusive remedy for employees who suffer injury or illness in the course of performing their job duties.

Though dependent upon the applicable state law definition, to qualify as an occupational disease, an employee typically must establish: (a) the disease or illness must be occupational, meaning that it arose out of and was contracted in the course and scope of employment, and (b) the disease or illness must arise out of or be caused by conditions particular to the work such that the risk of contracting the disease is to a greater degree and in a different manner than for the general public. To determine whether an injury “arises out of and in the course of employment” the general test is whether the employee was exposed to harm, in this case COVID-19, while engaged in some activity for the benefit of the employer. Although many communicable diseases are included under the definition of occupational disease, some states exclude “ordinary diseases of life,” such as the common cold or flu, from coverage. It is unclear how COVID-19 will be treated and that treatment could vary by state.

Generally speaking, even if an employer implements all of the proper infection control protocols to protect employees from exposure, if the employee can show that he or she contracted the virus after an exposure peculiar to the work, the employee may have a compensable claim. Employees also will have to demonstrate that they were not exposed to COVID-19 outside of the workplace. Due to the contagiousness of COVID-19 and the various modes of transmission, it will be difficult for both employees and employers to identify where an employee contracted the virus. For certain industries, such as health care, employees may have an easier time establishing that COVID-19 was peculiar to the employment, especially if the employee was assigned to specific COVID-19 units or patients. However, as states reopen and attempt to return to “normal,” employers may have more room to argue that employees contracted COVID-19 outside the workplace. Though the Occupational Safety and Health Administration (OSHA) now mandates that all employers who are required to maintain injury and illness logs[1] must determine if employees' COVID-19 cases are job-related, it acknowledged the difficulty of doing so in recent guidance.[2] Specifically, OSHA noted that “[g]iven the nature of the disease and community spread, in many instances it remains difficult to determine whether a coronavirus illness is work-related, especially when an employee has experienced potential exposure both in and out of the workplace.” Thus, as the country reopens, employers may have more opportunities to establish that an employee's COVID-19 diagnosis was not work-related.

EXCEPTIONS TO THE EXCLUSIVITY PRINCIPLE AND BARS ON COVERAGE

Generally, as mentioned above, workers' compensation is typically the sole and exclusive remedy for employees who suffer injury or contract an occupational disease. However, many states have statutory and/or common-law exceptions to the exclusivity principle, which would allow employees to bring civil lawsuits for workplace injuries and illnesses. In Colorado, for example, if an employee is injured or killed by a nonemployer third party's negligence or wrongdoing, the injured employee or his dependents may accept workers' compensation benefits and also file an action for damages against the third party.[3] As an additional example, North Carolina provides for limited exceptions to the Workers' Compensation Act, for a co-employee's “willful, wanton, and reckless” conduct[4] or an employer's intentional misconduct committed with the knowledge that such conduct is substantially certain to cause serious injury or death.[5] Other states provide similar exceptions for intentional conduct and co-employee wrongdoing, allowing a narrow line of on-the-job injury claims to proceed outside the workers' compensation framework. To note, employers who engage independent contractors as part of their workforce should be aware

of potential civil tort exposure for claims brought by nonemployees, as those typically fall outside of the workers' compensation exclusivity bar.

Employees seeking to litigate a claim outside of the workers' compensation forum will need to identify exceptions under the applicable state regulations, statutory authority, or case law and argue how their injury or illness falls outside of its scope. While dependent upon state law, for employees who claim to have contracted COVID-19 in the workplace, generally, they will need to establish that either (1) the employer committed intentional misconduct that was substantially certain to cause death or harm or (2) a co-employee acted in a reckless or wanton manner. In these situations, employees likely will claim that employers who failed to adhere to federal or state guidance on maintaining a safe workplace during the pandemic acted intentionally in a manner substantially certain to cause death or harm. Further, employees, specifically first responders and health care workers, may try to establish intentional conduct by claiming that an employer failed to provide employees with proper PPE prior to directing them to care for known COVID-19 patients. Employees trying to satisfy a co-employee's "willful, wanton, and reckless conduct" may need to demonstrate sufficient facts related to COVID-19 exposure. By way of illustration, a co-employee who reports to the workplace after testing positive for COVID-19, fails to inform his co-workers, and subsequently infects others in the workplace may meet the requisite threshold in some states.

Moreover, certain states address non-compensable injuries and illness, whereby employers may be able to establish that an employee was acting in such a manner that compensation should be denied. For example, in Pennsylvania, an injury or occupational disease is not compensable if it is intentionally self-inflicted;[6] is caused by the employee's violation of the law; or involves the employee's violation of the employer's positive order with exceptions.[7] Further, in Tennessee, employers may attempt to deny coverage if the employee engages in actions that would bar such a claim, including willful misconduct, willful failure or refusal to use a safety device, or willful failure to perform a duty required by law. And in New Jersey, employees are barred from receiving workers' compensation benefits if the injury or illness is caused by their willful failure to make use of a reasonable and proper personal protective device or devices that the employer provides, whose use is clearly a requirement of the employee's employment and is uniformly enforced, and, which an employer can properly document that despite repeated warnings, the employee has willfully failed to properly and effectively utilize.[8] Therefore, for employees who refuse to use mandated PPE or adhere to required safety protocols such as social distancing and handwashing, employers may have the ability to establish that workers' compensation coverage should be denied.

Finally, in the event a worker is employed by a subsidiary, parent corporations should be aware of potential tort exposure. For example, an employee may effectively pursue remedies under workers' compensation based on employment with the subsidiary. However, that employee may seek additional remedies by filing a civil tort action against the parent company. Such claims typically allege that the parent company created an independent duty to the employee by being somehow involved in the functions of the subsidiary through developing minimum operating standards or conducting safety audits. In these cases, the employee effectively tries to "double dip" and obtain damages in the civil court system that are unavailable through workers' compensation.

PRESUMPTION OF COMPENSABILITY: LOWERING THE BAR FOR COVERAGE OF COVID-19

Generally, under most state workers' compensation frameworks, employees need to present some medical evidence that their illness or injury was related to work in order to be eligible for benefits. To satisfy this threshold, they must establish some reasonable factual basis for asserting that the workplace caused their illness or injury. As discussed above, because COVID-19 can be transmitted in any number of ways outside of the workplace—including exposure to an infected family member or infection after interaction with a passenger on a transit system or a fellow shopper in the grocery store—employees may have difficulty tying their diagnosis to the workplace. In light of this heavy burden, many states have taken specific steps to address the impact of COVID-19 on the workplace by modifying the current workers' compensation framework and extending coverage to certain types of employees.

Currently, thirteen states[9] have enacted emergency rules, issued executive orders, published official guidance, and even passed legislation to specifically address coverage of COVID-19 under workers' compensation. Of the states that have addressed such issues, almost all have focused on extending coverage to first responders, health care workers, and in some cases, other “essential employees.” However, states have approached the issue of coverage in different ways, from creating a presumption of compensability for certain categories of workers to extending limited benefits to certain workers during periods of quarantine. For example, the Florida Office of Insurance Regulation published an informational memorandum reminding employers to extend workers' compensation coverage to first responders, health care workers, and other workers who contract COVID-19 due to on-the-job exposure.[10] Missouri passed an emergency rule that creates a presumption that first responders “infected by or quarantined due to COVID-19 are deemed to have contracted a contagious or communicable occupational disease arising out of and in the course of the performance of their employment.”[11] Alaska, Michigan, Minnesota, New Mexico, Utah, and Wisconsin also adopted similar presumptions, which an employer can challenge by providing evidence that the employee was not exposed in the workplace.

Perhaps the most significant pronouncement was by California Governor Gavin Newsom, who issued an executive order on 6 May 2020 that establishes a rebuttable presumption in workers' compensation claims, presuming that covered workers who are diagnosed with COVID-19 contracted the illness at work, without the employee having to provide any further proof. Although this presumption is rebuttable—meaning that an employer can provide evidence to refute the presumption, it is likely to be a high burden for employers to meet, especially given the wide variety of ways COVID-19 can be transmitted. Further, California extended the presumption to any worker who reported to work outside of the home at the direction of their employer and received a positive test or physician diagnosis, a far broader category of workers than most other states. Therefore, in California, most eligible workers' claims relating to on-the-job COVID-19 exposure likely will be covered by workers' compensation.[12]

The extension of workers' compensation coverage by many jurisdictions is not, however, proceeding without challenge. For example, in Illinois, an emergency amendment to the workers' compensation rules was suspended by a temporary restraining order and subsequently rescinded by the Illinois Workers' Compensation Commission days later. The emergency amendment would have created a rebuttable presumption of compensable occupational injury for first responders or essential front-line workers, including grocery store employees, who contract COVID-19 or are incapacitated as a result of exposure to COVID-19 on the job. Strong opposition to the emergency rule came from the Illinois Manufacturer's Association and the Illinois Retail Merchants Association. Though the other states that modified their workers' compensation schemes have not faced similar opposition, it

is likely that industry groups, chambers of commerce, and others will challenge the extensions of coverage as the country begins to reopen.

EMPLOYEES' ALTERNATE AVENUES FOR RELIEF

While workers' compensation likely will serve as the primary avenue for employee illness and injury claims regarding COVID-19, many may pursue, and already have begun to pursue, different legal theories. For example, employees may allege that an employer failed to provide adequate safety equipment and infection control protocols, endangering their health and safety. On 20 April 2020, the New York State Nurses Association filed three lawsuits challenging the failure of the New York State Department of Health (DOH) and two hospitals to adequately protect the health and safety of nurses treating COVID-19 patients and, in turn, jeopardizing patients, their families, and their communities.[13] However, the lawsuits are not alleging that nurses contracted COVID-19 in the workplace; rather, they are focusing on the hospitals and DOH's failure to implement and administer adequate protections for its employees, from improper PPE to a lack of training. Further, the requested relief is an injunction, mandating that the hospitals comply with the state directives for health care workers. Though the federal lawsuit was recently dismissed, the state court actions are pending, and it remains to be seen how these types of cases will fare in other jurisdictions.

Family members of deceased employees are also filing wrongful death and survival claims against employers, claiming that the employers required employees to work in unsafe conditions. Further, relatives of employees may attempt to bring derivative claims for personal injury alleging that they contracted COVID-19 directly from a family member who was exposed in their workplace. These claims would be similar in nature to claims brought by asbestos workers' family members who fell ill due to exposure to an employee's tainted clothing, and likely would not be barred by the exclusive remedy provision of workers' compensation.[14] As with the workers' compensation claims, establishing that the workplace was the point of exposure for both the employee and any infected family members may be difficult for claimants, even if the employee is a health care worker. Finally, employees may assert state law claims for intentional infliction of emotional distress, alleging that the employer's failure to provide PPE or enforce infection controls placed an employee in severe danger, which in turn caused the employee to suffer extreme mental distress. Emotional distress claims are difficult to sustain, as employees must demonstrate that the employer engaged in a threshold amount of outrageous conduct. Employees who allege their employer forced them to work without proper PPE in close proximity to COVID-19-infected individuals, or failed to implement adequate safety protocols, may be able to establish a cognizable claim. Further, health care workers may be more likely to file such claims due to the documented mental toll their work during the pandemic requires, especially if working without necessary protections. To note, in many states these claims may fall under workers' compensation; however, in certain jurisdictions, mental injuries may not be compensable under the current framework and, therefore, employees might be able to pursue these claims independently.[15]

COVID-19 AND OTHER EMPLOYMENT-RELATED CLAIMS

Though outside the scope of this article, in addition to claims related to an employee's exposure to COVID-19 in the workplace, employers should be cognizant of other causes of action employees may assert stemming from the pandemic. Many employees may bring charges of discrimination under the Americans with Disabilities Act (ADA) alleging unfair treatment relating to a health condition or the employees' presumed or actual COVID-19 diagnosis. Employers may also face failure to accommodate claims by workers under the ADA. Other claims may

arise under Title VII of the Civil Rights Act of 1964,[16] the Age Discrimination in Employment Act,[17] and state and local laws for discriminatory or retaliatory treatment in termination, furlough, salary, or hour reduction, and layoff decision making as well as in applying policies unfairly to protected classes. Further, employees also may raise claims surrounding the different federal, state, and local leave laws, from the Family and Medical Leave Act[18] and sick leave ordinances to the federal paid leave program under the Families First Coronavirus Response Act.[19] Finally, employees may seek to file claims under whistleblower protections afforded by various laws, including the Occupational Safety and Health Act,[20] the National Labor Relations Act (NLRA),[21] as well as state statutes,[22] including those addressing safety in the health care industry.[23]

CONCLUSION

As more and more employees continue to serve as essential workers, especially those in health care roles, or begin to return to the workplace in nonessential roles, it is likely that there will be a flood of COVID-19 pandemic litigation by employees against their employers. Assuming COVID-19 is a covered occupational disease or injury, most of these claims likely will be barred by applicable workers' compensation statutes absent egregious employer conduct. Employers should, however, be aware of the limitations and exceptions under the various applicable workers' compensation statutes, which differ from state to state. Further, to minimize the risk of employees' exposure to COVID-19 in the workplace, employers should remain up to date on all federal, state, and local directives regarding COVID-19, implement workplace guidelines addressing safety in the time of COVID-19, and establish or maintain a complaint procedure with a robust anti-retaliation provision.[24] Though such practices will not serve as a complete defense to a workers' compensation claim or a civil lawsuit, administration and enforcement of safety procedures may provide evidence that the employee contracted COVID-19 outside of the workplace.

Please stay tuned for the next installment of our series on employer liability, which will focus on governmental investigations and actions.

FOOTNOTES

[1] Employers with ten or more employees are required to keep a record of serious work-related injuries and illnesses, though certain low-risk industries are exempted. All employers, including those partially exempted by reason of size or industry classification, must report to OSHA any workplace incident that results in a fatality, in-patient hospitalization, amputation, or loss of an eye. 29 C.F.R. § 1904.39.

[2] Occupational Health and Safety Administration, Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19), May 19, 2020. Previously, OSHA required only healthcare employers, corrections facilities, and emergency-response providers to make the job-related determination.

[3] COLO. REV. STAT. ANN. § 8-41-203.

[4] *Pleasant v. Johnson*, 325 S.E.2d 244 (N.C. 1985).

[5] *Woodson v. Rowland*, 407 S.E.2d 222, 228 (N.C. 1991).

[6] 77 PA. STAT. AND CONS. STAT. ANN. § 431.

[7] *Nevin Trucking v. W.C.A.B.*, 667 A.2d 262 (Pa. Cmmw. Ct. 1995).

[8] N.J.S.A. 34:15-7 and 34:15-7.1.

[9] Alaska (creates a presumption of compensability for healthcare employees and emergency responders who contract COVID-19 during the public health disaster); Arkansas (reduces the burden of proof for front-line healthcare workers and first responders who contract COVID-19 at work); California; Florida; Kentucky (provides for a limited period of temporary total disability benefits for those workers who are removed from work by a physician for a period of self-quarantine as a result of occupational exposure to COVID-19 and includes presumption for healthcare workers, first responders, and other essential workers); Michigan (establishes a presumption that first responders who contract COVID-19 did so in the course of their employment for workers' compensation purposes); Minnesota (provides a presumption for COVID-19 workers' compensation claims for first responders and certain other employees); Missouri; New Mexico (creating a presumption that certain employees who contract COVID-19, including first responders, volunteer and paid medical personnel, and administrative and custodial staff at COVID-19 care centers, suffered a compensable occupational disease for workers' compensation purposes); North Dakota (providing workers' compensation benefits to first responders and front-line healthcare workers); Utah (rebuttable presumption for healthcare workers and first responders); Washington (extending workers' compensation benefits to healthcare workers and first responders who are directed to quarantine by a physician or public health department); and Wisconsin (first responders who test positive for COVID-19 are presumed to have contracted the virus at work for purposes of workers' compensation benefits).

[10] Informational Memorandum OIR-20-05M, April 6, 2020.

[11] 8 CSR 50-5.005 (For purposes of the Missouri Emergency Rule, a first responder is defined as “a law enforcement officer, firefighter or an emergency medical technician (EMT)”).

[12] The presumption applies to any employee who reported to work outside of their home at the direction of their employer and received a positive COVID-19 test or diagnosis by a physician (who holds a license from the California Medical Board) within 14 days of the employee's last day performing services at the employer's place of employment. If the claim is based on a physician's diagnosis, it must be confirmed by a positive COVID-19 test within 30 days of the diagnosis.

[13] The lawsuit was dismissed due to a lack of subject matter jurisdiction based on a pending labor arbitration between the parties.

[14] *Jimmy Williams, Sr., et al. v. Placid Oil Co., et al.*, 224 So. 3d 1101 (La. 2017).

[15] Many psychological conditions are seldom covered by workers' compensation, and some states prohibit mental health claims unless the employee can establish a direct connection to a physical workplace injury that was the cause of the mental injury.

[16] 42 U.S.C. § 2000(e).

[17] 29 U.S.C. § 623

[18] 29 U.S.C. § 2601.

[19] Families First Coronavirus Response Act, Pub. L. 116-127.

[20] 29 U.S.C. § 660(c) (providing protections for employees who raise a health or safety complaint with OSHA).

[21] 29 U.S.C. § 158(a); *see also Maine Coast Regional Health Facilities*, NLRB, 01-CA-209105, 01-CA-212276

(March 30, 2020) (noting that healthcare workers who are terminated for publicly raising concerns about working conditions in healthcare facilities may have a claim under the NLRA).

[22] For example, a nurse in Chicago filed a whistleblower complaint in Cook County Circuit Court against Northwestern Memorial Hospital in March, alleging retaliatory discharge, violation of the Illinois whistleblower statute, and respondeat superior. *Lauri Maurkiewicz v. Northwestern Memorial Hospital*, No. 2020L003511 (Ill. Cir. Ct. Mar. 23, 2020).

[23] 29 U.S.C. § 660(c); 210 ILCS 86/35 (Illinois' Hospital Report Card Act prohibits hospitals from retaliating against employees for reporting "any activity, policy or practice of a hospital that . . . the employee reasonably believes poses a risk to health, safety, or welfare of a patient or the public."); MICH. COMP. LAWS § 333.20180 (prohibiting health care facilities from threatening or discriminating against employees who make a good-faith complaint about an unsafe healthcare practice); TEX. HEALTH & SAFETY CODE § 161.134 (prohibiting hospitals from retaliating against employees for reporting a violation of law or an agency rule, including those related to unethical or unprofessional conduct).

[24] For resources relating to reopening best practices, please see K&L Gates Reopening Guide.

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