



## PREVENTING COVID-19-RELATED ACTIONS AGAINST EMPLOYERS IN WASHINGTON STATE

The coronavirus pandemic has driven us to uncharted waters. With this new uncertainty comes litigation. We want to help you understand the types of claims we are seeing and expect to see against employers, what your business can do today to minimize risk of these claims, and some initial steps to consider if your company is sued or threatened with a lawsuit.

### I. COVID-19-RELATED CLAIMS AGAINST EMPLOYERS--WHAT TO EXPECT IN WASHINGTON STATE.

#### A. Employees' injury under OSHA and Workers' Compensation

##### 1. U.S. Department of Labor Enforcement Actions

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) has indicated that it will bring COVID-19 driven enforcement actions under the Occupational Safety and Health Act's general duty clause, which makes employers ensure their workplace is "free from recognized hazards that are causing or likely to cause death or serious physical harm." [Section 5\(a\)\(1\)](#) of the [Occupational Safety and Health \(OSH\) Act of 1970](#), 29 U.S.C. § 654(a)(1); <https://www.osha.gov/SLTC/covid-19/standards.html>.

##### 2. Workers' compensation claims

Workers experiencing a COVID-19-type injury may be able to pursue coverage under a state's workers' compensation act to collect specific benefits upon showing the viral exposure was work-related. Washington's Industrial Insurance Act or workers' compensation (RCW Article 51) provides injured workers a swift, no-fault compensation system for workplace injuries. In exchange, employers are given immunity from civil suits. *Birkliid v. Boeing Co.*, 904 P.2d 278, 282 (Wa. 1995).

Washington state recently issued guidance stating that in most cases COVID-19 is not a work-related condition covered by workers' compensation: "When the contraction of COVID-19 is incidental to the workplace or common to all employment (such as an office worker who contracts the condition from a fellow employee), a claim for exposure to and contraction of the disease will be denied." <https://lni.wa.gov/agency/outreach/workers-compensation-coverage-and-coronavirus-covid-19-common-questions>. Workers' compensation claims in Washington state are likely to be accepted when:

"the worker's occupation [has] a greater likelihood of contracting the disease because of the job (examples include first responders or health care workers). There must also be a documented or probable work-related exposure, and an employee/employer relationship."

*Id.*

### 3. Intentional-act exception to employer's immunity

Normally, the workers' compensation scheme provides the employer with immunity from injury lawsuits by its employees, but that immunity does not cover intentional acts. In Washington, if "injury results to a worker from the deliberate intention of his or her employer to produce such injury" then the worker has the right to file a lawsuit for his or her injuries. RCW 51.24.020. Washington's Supreme Court has interpreted "deliberate intention" to mean "the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Birkliid* at 285. Negligence or gross negligence is not enough. *Id.* at 283.

While we are not aware of any of these types of cases having yet been filed in Washington, here are examples from other jurisdictions.

- Walmart was sued in a wrongful death lawsuit alleging it failed to properly respond to its employees' symptoms of COVID-19 and share related information that would have helped safeguard other employees. The complaint alleges that Walmart's "willful and wanton misconduct and reckless disregard" led to the worker's death. *Toney Evans v. Walmart, Inc. et al*, Case No. 2020 WL 1697022 (Ill. Cir. Ct. Apr. 6, 2020) (Trial Pleading).
- The family of a meatpacking worker who died due to COVID-19 brought a wrongful death suit against his employer. The family alleged the employer breached its duty to provide a safe working condition by not providing PPE, enforcing distancing guidelines, and not complying with the CDC's guidelines to prevent virus spread, alleging that defendants "knew of the hazardous conditions in which Decedent was being exposed to and failed to take appropriate measures to resolve or address them." *Blanca Esther Parra v. Quality Sausage Co.*, 2020 WL 2231332 (Tex. Dist. Apr. 30, 2020) (Trial Pleading).

The workers' compensation immunity rule in Washington state may bar employees' COVID-19 claims against employers, but employers must protect against any of their practices being considered deliberately intended to injure.

#### B. Exposure lawsuits filed by people who are not employees

Beyond direct injury to employees, there are other litigation risks that employers need to be aware of regarding exposures to COVID-19. Whether a business may be liable for a failure to act depends on whether it owes a duty of care to a potential plaintiff. Generally, a business owes a reasonable duty of care to its customers to protect them (*e.g.*, warnings or protective measures) from foreseeable harm. Once a duty of care is established, the questions then become whether the duty was breached, and whether the breach caused the plaintiff's injuries. Each of these are touched on below.

##### 1. Potential plaintiffs

Besides employees, customers, and even unknown strangers may claim to be harmed by a business's failure to warn of past exposures to COVID-19 at its workplace or failure to protect

customers and strangers from exposure. One example would be when an employee is exposed to COVID-19 at work and then goes home to his or her family or roommates and they contract COVID-19. Other examples include customers, clients, contractors, and delivery personnel who come to your business and are exposed to COVID-19. See *Weissberger v. Princess Cruise Lines, Ltd.*, 2020 WL 1151023 (C.D. Cal. Mar. 9, 2020) (Trial Pleading) (alleging that cruise company was negligent for failing to have screening protocols in place prior to boarding the passengers on plaintiffs' voyage and not warning of risk).

## **2. Breach of duty**

Both reason and the law dictate that businesses should, at minimum, follow federal, state and local guidelines regarding COVID-19. RCW 5.40.050 (violation of a statute or ordinance may be considered as evidence of negligence); *see generally* Restatement (Second) of Torts § 286 (local ordinances are basis for a standard of care the violation of which is negligence per se). Failing to use more stringent safety measures, which are not legally required, but which other businesses in the same industry or industry-specific associations have adopted may also be used to determine whether a duty was breached. *See e.g., BKelley v. Howard S. Wright Construction Co.*, 582 P.2d 500, 509 (Wa. 1978) (upholding manuals showing standard of care in the industry as admissible evidence).

## **3. Proof of “causation” will be critical in these types of cases**

Proving causation requires evidence that the plaintiff contracted COVID-19 from the business, or another employee, as opposed to contracting it from a host of other potential sources. COVID-19 has a genetic type or unique identifier, like a person's fingerprints.<sup>1</sup> “If samples are collected and preserved, a microbiologist can identify the genetic sequence of the pathogen that afflicted a patient, type that sequence and compare it to other recorded sequences for a possible genetic match.” Dinnell, Adam, “Genetic ‘Fingerprinting’ May Be Key in Virus Exposure Suits,” *Law360*, Portfolio Media, 27 April 2020. This allows experts to offer opinions about how plaintiff may have contracted the virus and provide scientific evidence to disprove causation.

### **C. The Quick Transition to WFH May Expose Employers to Wage Claims**

Emergency shutdown orders instituted across the country meant that many employers were forced to quickly transition workers into remote roles. The transition to remote work presents many of its own challenges for employers, particularly as it relates to wage and hour claims. The Fair Labor Standards Act (FLSA) and its state equivalents govern minimum wage and overtime requirements for non-salaried and non-exempt employees. As employers adjust to managing remote employees, accurately tracking and recording employee work time may prove difficult. As the lines between work and home begin to blend for many people, employers may find that employees are working through required lunch breaks or working later than scheduled – scenarios that could both result in claims for uncompensated overtime, depending on how the

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<sup>1</sup> Scientists have identified genome sequence for SARS-CoV-2, which causes COVID-19. Sah, Ranjit, et al. *Complete Genome Sequence of a 2019 Novel Coronavirus (SARS-CoV-2) Strain Isolated in Nepal*, American Society for Microbiology, Microbiology Resource Announcements® 9e00169-20 (Vol. 9, Issue 11) accessed May 15, 2020 at <https://mra.asm.org/content/9/11/e00169-20>.

employee's time is being tracked and recorded. Employers may also face claims from salaried and exempt employees as a result of the changed circumstances that remote work presents. For example, employees who receive at least half of their pay from commission – who are typically exempt from overtime requirements under the FLSA – may be entitled to additional compensation if sales (and therefore commission) have dropped.

Employers will also face unique challenges when workers return to the office. Employers may be encouraged or required to take steps intended to prevent the spread of the coronavirus, such as testing employees for the virus or taking employees' temperatures before employees enter the building. If such measures are required, employees may be entitled to compensation for those pre-shift activities.

#### **D. FFCRA leave issues**

The Family First Coronavirus Response Act (FFCRA), passed by Congress in March, expands the FMLA by allowing eligible employees to take protected leave for coronavirus-related childcare reasons and obligates employers to provide paid leave after the first two weeks of absence. It also requires employers to provide up to 10 days of Emergency Paid Sick Leave for certain coronavirus related reasons. Attorneys anticipate employers will face claims that they improperly denied leave or that they retaliated against employees who requested leave. At least one such suit has already been filed. *Jones v. Eastern Airlines LLC et al.*, 2:20-cv-01927 (E.D. Pa. Apr. 16, 2020) (employee alleges she was fired after requesting leave under the FFCRA).

#### **E. Mass Layoffs**

COVID-19 has forced many employers to consider or implement reductions in workforce measures that may implicate the Worker Adjustment and Retraining Notification Act (WARN Act). The WARN Act requires a covered employer to provide at least 60 days' advance notice of plant closings or mass layoffs if they constitute an employment loss as defined in the WARN Act. Employers who fail to provide the requisite notice may be liable for affected employees' backpay and benefits, as well as for a civil penalty. 29 U.S.C. § 2104.

But COVID-19 may relieve an employer of its notice obligations if it triggers one of the Act's limited exceptions. Current Department of Labor guidance on COVID-19 encourages employers to review the Act's "unforeseen business circumstances" exception. See "Worker Adjustment and Retraining Notification Act Frequently Asked Questions," <https://tinyurl.com/ycmwnlc6>. This exception arises when a plant closing or mass layoff was not "reasonably foreseeable," but was "caused by some sudden, dramatic, and unexpected action or condition outside the employer's control." 20 C.F.R. § 639.9(b)(1). Attorneys anticipate litigation on whether an employer can rely on the Act's narrow exceptions, like unforeseen business circumstances, to avoid the 60 days' notice requirement.

Regardless of the WARN Act's notice requirement, employers risk other legal liability when laying off employees. For example, an employer may be liable under discrimination laws if they lay off employees in a way that has a disparate impact on workers of a protected class.

## **F. ADA and Teleworking**

Employers face numerous logistical and legal obstacles as they plan how to safely reopen workplaces. Employers that have allowed teleworking can anticipate that high-risk employees may resist returning while COVID-19 remains a threat. Whether an employer is required to continue permitting an alternative work arrangement like teleworking is a fact-intensive inquiry that may implicate the Americans with Disabilities Act (ADA) and Governor Inslee's Proclamation 20-46 regarding High-Risk Employees. According to EEOC pandemic guidance, an employee at high risk for severe illness related to COVID-19 is entitled to reasonable accommodations under the ADA, which may include teleworking to reduce the chance of infection. *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, U.S. Equal Employment Opportunity Commission, <https://tinyurl.com/ydahfkot>. Governor Inslee's 20-46 Proclamation, which expires June 12<sup>th</sup> unless extended, goes further by requiring employers to make alternative work arrangements such as teleworking for high-risk employees.<sup>2</sup> [Summary of Governor Inslee's Proclamation 20-46](#). Accordingly, employers may risk violating the ADA and/or Governor Inslee's proclamation by denying a high-risk employee's request to continue teleworking.

## **G. Misrepresentation and Consumer Protection Act Claims**

Common law claims for misrepresentation or statutory claims under the Consumer Protection Act (RCW 19.86) may be asserted if a business makes representations that are false and that others rely upon. The misrepresentations can be made in advertisements, signs, verbal statements, or contractual representations if they are false, misleading or incomplete. With respect to COVID-19, these types of claims could arise from statements made by businesses about the steps being taken to reduce the risk of exposure to COVID-19, statements regarding the risk associated with interacting with the business, or statements about the risk of exposure from a business's products. For example, if a business advertises that it is taking certain steps to protect its clients, that business should be factually accurate as to what steps it is taking and avoid expressing or implying a guarantee that there will be no risk of exposure.

## **H. Federal or State Immunity Legislation**

Companies should not relax in reliance on potential federal or state immunity legislation. For example, the immunity legislation proposed by the U.S. Chamber of Commerce would cover claims related to wage and hour issues, leave policy, travel restrictions, telework protocols and workers' compensation and would not be available for companies guilty of gross negligence, recklessness or willful misconduct. Putting aside the politics of whether such legislation will be passed, as explained below, any such legislation will likely face legal challenges. In response to COVID-19, the Secretary of Health and Human Services (HHS) invoked the Public Readiness and Emergency Preparedness Act (PREP Act) in February to encourage the expeditious development and deployment of medical countermeasures to combat the virus. In the declaration, the HHS Secretary limited legal liability for losses relating to the administration of

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<sup>2</sup> The proclamation also prohibits employers from denying leave requests submitted by high-risk health care providers and emergency responders, entitles high-risk employees to access accrued leave or unemployment benefits if alternative work arrangements are not feasible, and mandates continued health care coverage for high-risk employees during such leave.

medical countermeasures such as diagnostics, treatments, and vaccine development during this public health emergency. The immunity does not apply to death or serious injury caused by “willful misconduct.” The PREP Act’s broad grant of immunity has been held to preempt civil actions for damages under state and federal laws and generally will be limited to healthcare providers and pharmaceutical manufacturers. Whether these immunity protections could be made retroactively has not been raised under the PREP Act. The first federal legislation to present this issue was the 2008 FISA Amendments Act.

That Act granted retroactive immunity to telecommunications providers that may have facilitated warrantless surveillance by the federal government between 2001-07. The ACLU sued claiming retroactive immunity was unconstitutional. A federal judge dismissed the lawsuit and the federal appellate circuit court upheld the dismissal, but the U.S. Supreme Court declined to take up the issue. While the issues raised by the ACLU are likely very different than the likely arguments COVID-19 plaintiffs may make regarding the constitutionality of a federal employer immunity act made retroactive, employers should not assume which way state or federal courts would rule if asked to apply such immunity in a specific case.

## **II. STEPS TO HELP AVOID THESE TYPES OF LAWSUITS**

Prevention is the best medicine. Summit’s preventative checklist of do’s and don’ts for employers regarding COVID-19 is found here: [COVID-19 Checklist for Employers](#)

## **III. WHAT IF YOU ARE SUED?**

Even if you take the steps above, your company may still be sued. Take immediate steps to defend the claim, including the following:

1. Notify counsel and all insurers who may provide coverage for such a claim.
2. Consider if there is an opportunity to quickly resolve the claim. An early case assessment and case budget are critical tools to help make wise decisions at the beginning of a case.
3. Obtain and preserve evidence, including any medical samples from tests with health care providers or public health departments. Make sure to put parties to the lawsuit and potential third parties on notice to preserve any samples within their possession, custody or control to avoid spoliation of evidence.
4. Determine if early dismissal of the lawsuit is possible due to workers’ compensation exclusive remedy bar, resulting in a quick resolution to the lawsuit, leaving only a workers’ compensation claim.
5. Gather documents and identify witnesses to demonstrate the company’s COVID-19 response plan and measures, representing your commitment to employee safety.

6. Identify and retain appropriate expert witnesses to show that your company adhered to federal, state and local laws and guidance regarding COVID-19, as well as accepted industry standards of protective measures for COVID-19 safety.
7. Are there lessons learned that need to be implemented promptly to avoid additional claims?

#### IV. CONCLUSION

The real-time reaction and constant changes in response to COVID-19 is a challenge for employers. The issues and guidance are constantly changing. New legislation is frequently debated and some of it passed at every level (state, local and federal) to try and address issues specific to COVID-19. Novel lawsuits will continue to be filed. Your choices and actions today will, for better or worse, impact how those lawsuits play out. Safety first.

Click here to see other COVID-19 resources prepared by Summit Law Group:  
<https://www.summitlaw.com/covid-19-resources>.

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