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Briefly

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EMPLOYER AND BUSINESS LIABILITY IN THE AGE OF THE COVID-19 PANDEMIC

J. Eric Harrison

"With a vaccine set to be approved in December 2020, employers may wonder whether they can or should require their employees to receive the vaccine when it becomes available."

The COVID-19 pandemic has resulted in disruptions in the lives of almost every American. The disruptions have ranged from minor inconveniences to loss of freedoms and economic turmoil, while some have been sickened and/or hospitalized and over 280,000 Americans have died. It is to be expected that there will be a wave of litigation concerning these losses suffered during the pandemic. While we can expect suits by private entities and governmental entities against both foreign governments and federal, state and local governments, this article will focus on liability for businesses and employers in the private sector.

GENERAL LIABILITY

We anticipate that individuals or classes of persons will file suit against private businesses under negligence theories that will allege the business failed to protect customers, clients and/or the public by failing to follow recommended or advisable protocols and precautions to prevent the spread of coronavirus. Any negligence case requires the plaintiff to prove that the defendant breached a duty of care that was owed to the plaintiff which was the proximate cause of injury or death. It is the causation element of negligence law that poses the most significant obstacle to recovery for the plaintiff in these suits. Because the virus is so widespread and the modes of exposure and transmission are so varied and often difficult to pinpoint, much less prove in a court of law, a plaintiff seeking recovery will have a very difficult time in most instances being able to prove that the failure of the defendant to follow or implement certain protocols or safety procedures led to the actual exposure of the plaintiff to the coronavirus that sickened the plaintiff. However, the causation obstacle could be more difficult in certain situations than others. For instance, think of the difference between a patient or visitor in a hospital setting, versus a customer in a grocery store, versus a client visiting a small office setting. Additionally, how will the courts handle the issue of the business establishing sufficient protocols and safety procedures yet allegedly failing to properly enforce them?

PROTECTIVE LEGISLATION

Protection may be on the way for employers and businesses in the form of legislation that has been passed or is pending at both the state and federal levels regarding liability protections. Most of those laws would limit or eliminate liability and/or provide immunity for businesses from negligence suits related to the COVID-19 pandemic. Most such laws as passed or proposed have exceptions for gross negligence or willful misconduct, would establish a clear and convincing evidence standard for burden of proof for the plaintiff (which is a higher burden of proof than the typical civil case, which is preponderance of the evidence) and would provide for limitations on recoverable damages in such suits. Some of the legislation passed/proposed would apply retroactively back to the spring and summer of 2020.

MEDICAL CARE AND DIAGNOSTICS

There could also be a wave of medical malpractice cases related to diagnosis and treatment of coronavirus-infected patients. Again, as with a typical negligence case, a medical malpractice case requires proof of causation. It is also conceivable that there may be testing labs that are sued due to false negative or false positive test results. Further, because the mortality rates in nursing homes are so much higher than in the general population, we expect to see suits against nursing homes for not only failing to properly diagnose and treat and/or quarantine patients, but also for failing to enact and enforce proper protocols and safety procedures to protect the very vulnerable nursing home patient population.

BREACH OF CONTRACT

There could also be a wave of litigation related to breach of

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AS THE COVID-19 VIRUS RAGES ON …

Mary C. Moffatt

"Handing out masks or respirators to employees or making them available for the taking may not be enough."

As the COVID-19 virus rages on, employers continue to grapple with compliance issues in the workplace. Among those issues is compliance with the General Duty Clause and other workplace standards of the Occupational Safety and Health Act of 1970.

On December 4th, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) announced that since the beginning of the pandemic through November 26, 2020, it has issued citations arising from 255 inspections for violations relating to coronavirus, resulting in proposed penalties totaling over $3,000,000. The most frequently-cited violations have been:

1. Failure to implement a written respiratory protection program;
2. Failure to provide a medical evaluation, respirator fit test, training on the proper use of a respirator and personal protective equipment;
3. Failure to report an injury illness or fatality;
4. Failure to record properly an injury or illness as part of OSHA recordkeeping; and
5. Failure to comply with the General Duty Clause of the Act.

There are several components required to each of the above-noted compliance measures. For example, compliance with the respiratory protection standard includes medical evaluation, fit testing, the written respiratory protection program, and effective employee training related to the program, which includes being able to demonstrate proper fit and usage of the respirator. OSHA has also issued a 6-page document intended to help employers understand these most frequently cited violations, which can be found at *https://www.osha.gov/SLTC/covid-19/covid-citations-guidance.pdf*

As part of OSHA's efforts to protect employees, it has recently updated its FAQs addressing the use of cloth face coverings as personal protective equipment (PPE) and whether such coverings constitute PPE under OSHA guidelines. The bottom line is OSHA is not able to state categorically that a cloth face covering constitutes PPE under the OSHA standard. As most are aware, there are differences between (1) cloth face coverings, (2) surgical masks, and (3) respirators. Cloth face coverings are most commonly commercially produced, or improvised scarves or bandanas, with the concept being that the garment, when worn over the nose and mouth, protects against the wearer's potentially infectious respiratory droplets from being spread when the individual coughs, sneezes or talks - and thus, limits the spread of COVID-19. These commercially produced cloth face coverings are not currently considered PPE by OSHA. These coverings will not protect the wearer against airborne transmissible agents, due to a loose fit or lack of a proper seal. OSHA takes the position that these are not appropriate substitutes for PPE such as N95 respirators, medical facemasks, etc. particularly in workplaces where respirators or facemasks are recommended or required to protect the wearer. At this time, OSHA does not believe enough information is available to determine whether a cloth face covering provides sufficient protection from COVID-19 to be considered PPE under OSHA's standard at 29 CFR 1910.132.

In addition, on December 9th, OSHA released a video providing the following (5) familiar tips to keep employees safe during the holidays:

1. Train workers on safe practices such as facemasks and social distancing;
2. Maintain social distancing between workers and customers;
3. Encourage workers to stay home if they are sick;
4. Clean and disinfect work surfaces and equipment;
5. Encourage workers to report any safety and health concerns.

All of the foregoing reflects OSHA's continued emphasis on compliance with applicable standards and enforcement efforts related to the pandemic. Employers should continue to assess the COVID-19 hazards in their workplace and ensure compliance with applicable standards. Handing out masks or respirators to employees or making them available for the taking may not be enough. If employees are required to wear PPE, they must be trained in accordance with OSHA guidelines. Likewise, just handing an employee a bottle of disinfectant or cleaning agent may not be sufficient if the employee is not trained on the "cleaning time" or "kill time" applicable for each substance or how to clean and disinfect effectively, while protecting themselves during the process. In addition, it is essential to maintain documentation of training, policies, and other compliance measures in the workplace. *Many employers, while very conscientious about the concept of training, fail to insure the employees understand the significance of the training, fail to cover all the required topics in the training, or fail to document sufficiently that the training occurred, who participated, and the topics covered during training.* Employers with questions regarding these issues should consult with their employment counsel, and the attorneys at Wimberly Lawson are available to assist.

HOLIDAY TRAVEL SAFETY

Courtney C. Hart

"As with most things COVID-19 related, employee travel policies are new to most employers and raise several questions and concerns."

With a new surge of COVID-19 cases popping up in many locations, holiday travel raises concerns for more than just those traveling this year. As employers, we must think about the safety of our employees and customers. For some, this may result in the need to implement a holiday travel policy. As with most things COVID-19 related, employee travel policies are new to most employers and raise several questions and concerns.

It is encouraged that employers consider the least restrictive means available when implementing a travel policy. That means, not restricting travel, but instead encouraging safe travel and providing ways for employees to return to work in the safest way possible.

PRE-TRAVEL

Of course, to encourage safe travel and prepare for a safe return to work, the employer must first be informed that the employee is in fact traveling. There is no law prohibiting employers from requiring that employees provide notice of their personal travel. Implementation of a policy requiring employees to notify management of out-of-state or long-distance travel should be the first step in limiting potential unnecessary exposure to the virus. As a part of the planning process, employers should consider how much advance notice they will need to make a determination on the handling of employees' travel plans. This timeframe for providing notice should be specified within the policy.

POST-TRAVEL

As the main purpose of a travel policy is to reduce the spread of COVID-19, how employers handle employees returning to the workplace after out-of-state or long-distance travel is crucial. Employers should strive to implement a policy that clearly explains what will happen after employees' travel, whether this be requiring self-quarantine or COVID-19 testing.

Some employers, who are able to offer remote work options, may want to require all traveling employees to self-quarantine. However, there is no need to require self-quarantine and/or COVID-19 testing every time an employee travels. Instead, employers may draft their policies with a focus on risk of potential exposure. This means that employers can consider the following when determining whether an employee is required to self-quarantine or test:

- Employee's travel destination;
- Employee's means of travel;
- Any stops made along the way;
- Duration of travel;
- Activities participated in during travel;
- Whether the employee was able to socially distance; and
- Whether the employee wore a mask.

Employers who decide to implement a policy based on case-by-case determinations must be sure that they are applying their analysis fairly to each traveling employee. Further, employers should take detailed notes outlining their decision and the reasons behind the decision made.

As a part of their travel policy, employers must also determine whether or not they will be paying traveling employees who are required to self-quarantine for their time spent at home in quarantine. Generally speaking, paying employees for their self-inflicted need to self-quarantine is discouraged, as it is likely to lead to abuse.

The best option is to allow employees who can work remotely from home to do so. As for employees who cannot work from home, your policy may allow for employees to use up any previously unused vacation, sick, or other paid time off. If the employee does not have any paid time off available, then the self-quarantine could be considered an unpaid leave of absence.

Keep in mind that a travel policy does not have any bearing on COVID-19 related time off under the Families First Coronavirus Response Act (FFCRA), which requires employers to provide paid time off when the employee:

- Is subject to a federal, state, or local quarantine order;
- Has been advised by a healthcare provider to self-quarantine;
- Is experiencing COVID-19 symptoms and seeking a medical diagnosis;
- Is caring for another individual subject to a quarantine order or doctor-directed self-quarantine; or
- Is caring for a child whose school or daycare is closed for COVID-19-related reasons.

The important take-away here is that if you have concerns over employee holiday travel, you should implement a policy and strictly follow it. As always, if you have any questions about or need assistance with creating your company's holiday travel policy, you can reach out to us here at Wimberly Lawson. We are always happy to help.

contract claims against private entities, particularly those in the hotel and hospitality industry, travel industry, and with colleges and universities. Many of these sectors have been particularly hard-hit due to quarantine and travel restrictions. And, since many of the sectors require substantial prepayment weeks or months in advance, failure to pay refunds or reschedule events and services could result in suits against those entities. And they may be subject to the same types of negligence suits as other businesses for failure to enact and enforce proper protocols and safety procedures related to COVID-19. There could also be breach of contract claims between retailers, distributors and suppliers of certain goods and products due to interruptions in the supply chain.

PRIVATE INSURANCE COVERAGE

Some businesses have business interruption or loss of revenue insurance policies that could generate litigation against the insurers for failing to properly or timely pay claims under those policies. Major League Baseball is certainly looking into this.

PRODUCTS LIABILITY

Products liability and fraud suits could also become more prolific in the next year across a wide range of industries. Those suits would likely involve claims of faulty personal protective equipment and/or defective health and safety products, as well as claims of false or misleading labeling and advertising, or misrepresentations of proper usage and effectiveness, for items like hand sanitizers, air filters and masks.

WORKERS' COMPENSATION

Finally, we expect a wave of workers' compensation claims related to employees who allegedly contracted the coronavirus in conjunction with their work duties. However, workers' compensation claims would have the same causation issues as civil negligence claims. The worker would have to prove that the coronavirus exposure occurred at work or while the employee was acting within the course and scope of employment. As with negligence claims, this could be a high bar to cross. The essential functions of the job, as well as with whom, and in what setting, the work is performed, can make a difference in the likelihood of success of those claims. Again, think of an employee at a grocery store, versus a nurse in a hospital that treats coronavirus patients, versus a clerical worker who is in a small office and has very little interaction with the public. Each of those different scenarios poses a different likelihood of success in a workers' compensation claim. The employer does get the protection of the exclusive remedy rule, which means that the employee's claims are limited to the scope of the workers' compensation statute, and the employer cannot also be sued by the employee for civil negligence for alleged exposure. However, we can also envision civil negligence suits by third parties (which are not constrained by the exclusive remedy rule) against an employer whose employee had contracted the virus at work and transmitted it to the third party. Again, however, the causation element would likely be difficult to prove depending on the facts and circumstances.

MANDATORY VACCINES & EMPLOYER POLICIES

Employers may also face liability from running afoul of various employment laws impacted by the institution of certain COVID-19-related policies and procedures. With a vaccine set to be approved in December 2020, employers may wonder whether they can or should require their employees to receive the vaccine when it becomes available. Health care facilities often have mandatory vaccination policies for at least certain members of their workforce. But what about other businesses? Employers considering such a policy should first realize there are legal limitations to making such a policy. In 2009, the EEOC first issued guidance, which was updated in March 2020, on dealing with medical questions during a pandemic. While certain medical-related inquiries are allowed during a pandemic due to the substantial health risks to the workplace and general population, the COVID-19 pandemic does not eviscerate all protections provided by the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964. In particular, employees who are unable to take the vaccine for medical reasons, or object based on sincerely-held religious beliefs, are entitled to reasonable accommodation from a mandatory vaccine policy (absent undue hardship to the employer). These accommodations, depending on the particular circumstances of the business, may include use of personal protective equipment such as face and nose coverings, telework, or temporary reassignment due to high-risk factors. Each must be considered on an individual basis as part of the interactive process.

Of course, this begs the question of whether the employer should mandate such a policy in the first place. Absent those who work directly with health-compromised individuals, the business justification is not as strong. Rather, the EEOC guidance suggests that employers encourage employees to obtain a readily-available vaccine for the flu, or in this case COVID-19, but not require it unless the demands of the business so require subject to reasonable accommodation.

CONCLUSION

As if the toll on society through impacts on health, prosperity, school attendance, politics, and the way we go about everyday life was not enough, businesses need to keep an eye on the potential exposure to legal liability associated with the current pandemic. While legislative help may be on the way and a plaintiff's burden of proof may prove difficult to meet, employers would be wise to monitor these developments while continuing to take reasonable steps to protect the health and safety of their employees, customers, and vendors. Here's looking forward to 2021!