

# COVID-19 Workplace Illness and Death Claims

## Another Concern for Employers as Businesses Resume Operations

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Workers' compensation normally provides the exclusive remedy for employee injuries and occupational diseases that arise in the course and scope of employment. When an employee gets hurt at work, the employer doesn't have to worry about defending a claim that it was negligent in allowing the injury to occur. That is because in workers' compensation, the worker does not have to prove that his employer was at fault to receive benefits. Similarly, when an employee contracts an occupational disease due to the conditions of work performed, the employee can typically only receive workers' compensation benefits, and cannot recover other damages from his employer, such as pain and suffering. And when an employee contracts a cold or flu bug from a co-worker, employers are not normally concerned about liability for such illness, as they are "ordinary diseases of life" which are not covered by workers' compensation in most jurisdictions.

But these are not "normal" times, and COVID-19 is a disease that is straddling the bounds between occupational diseases and ordinary diseases of life, as certain types of employment involve higher risk of COVID-19 infection. Employers should anticipate the possibility that workers may file workers' compensation claims as well as lawsuits alleging negligence and other theories of liability outside the workers' compensation arena for COVID-19 infections. The filing of such lawsuits has already begun.

### **COVID-19 Wrongful Death Lawsuits Against Employers**

In April, the family of a Wal-Mart employee filed a wrongful death suit against the retailer, alleging that Wal-Mart was negligent, willful, and wanton in failing to take steps to protect the employee from contracting COVID-19 at work, from which he died. The suit alleges that Wal-Mart failed to exercise reasonable care and failed to maintain a safe and healthy environment in the store, and failed to protect employees and customers from contracting COVID-19, whom it knew were at high risk of exposure and infection due to the number of people in the store each day. The suit alleges that Wal-Mart:

- Failed to properly clean and sanitize the store and to conduct periodic inspections of the store, and failed to train employees in such infection control procedures
- Failed to implement and enforce social distancing guidelines
- Failed to provide employees with personal protective equipment (PPE) such as masks and gloves
- Failed to address employees with apparent COVID-19 symptoms, failed to implement policies to identify and isolate sick employees, and failed to close the store when it realized employees were exhibiting COVID-19 symptoms
- Failed to follow the Occupational Health and Safety Administration's (OSHA) workplace standards and guidance for COVID-19
- Failed to implement engineering controls designed to prevent COVID-19 infection (e.g., physical barriers, sneeze guard, and high-efficiency air filters)

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- Failed to follow the Center for Disease Control and Prevention (CDC) guidelines, and failure to develop an Infectious Disease Preparedness and Response Plan as recommended by the CDC
- Failed to provide soaps, wipes and cleaning agents as recommended by the CDC
- Hired employees remotely without screening them for COVID-19 symptoms before starting work

A similar lawsuit was recently filed in Texas, alleging that the employer of a deceased worker had been negligent. The lawsuit alleges that the employer placed greater importance on profits than human life, and refused to take the pandemic seriously, implementing no safety protocols for its workers as they fell ill with COVID-19. The lawsuit claims that when the deceased worker became ill with the disease, he was told to keep working, and he ultimately died after contracting COVID-19 on the job.

These lawsuits are examples of how employees or their families will try to circumvent workers' compensation and seek higher damage awards in civil courts.

### Workers' Compensation & Occupational Disease – Exclusive Remedy is State-Specific Analysis

Whether an employee who claims to have contracted COVID-19 in the course of employment has an "occupational disease," for which he may receive workers' compensation benefits, depends on the laws of the state where the illness occurred. Insurance policies typically require that the disease be "caused or aggravated by the conditions of employment." Thus, an employee ordinarily would need to provide evidence linking the disease to their employment. With community spread of COVID-19, it may be difficult for employees to establish that their exposure occurred while working, particularly if there are no heightened risk factors in the place of employment. And many states' laws will exclude ordinary diseases of life from compensable workers' compensation disease claims. But some states are enacting legislation and rules making it easier for some workers to get workers' compensation benefits for COVID-19 infections.

For example, Missouri's Department of Labor and Industrial Relations, with the Division of Workers' Compensation, created an [emergency rule](#) providing a presumption that First Responders contracting COVID-19 have a compensable workers' compensation occupational disease claim. Minnesota similarly enacted a new law providing that certain employees who contract COVID-19 are presumed to have an occupational disease compensable with workers' compensation [benefits](#). The Minnesota law applies to front line workers such as law enforcement officers, first responders, and health care providers, as well as persons required to provide child care to first responders and health workers under Minnesota Executive Orders. California's Governor similarly signed an Executive Order in early May, creating a rebuttable presumption to make it easier for workers who get sick with COVID-19 at work to access workers' compensation benefits for a period of time. Additionally, the Federal Employees Compensation Act provides benefits to federal employees who contract COVID-19 in the performance of their job, with new claim procedures enacted by the U.S. Department of [Labor](#).

### Plan for the Possibility that Workers will File Work Comp Claims and/or Civil Lawsuits

Employers should plan for the possibility that workers will file workers' compensation claims, tort lawsuits, or a combination of the two, if its workplace is the location of a COVID-19 "cluster" or it otherwise has workers who believe they contracted COVID-19 at work. Employers should take steps to reduce their risk of such claims and litigation and to control the evidence available in potential litigation.

As employers [bring their workers back to work](#), or encounter COVID-19 infections in the workplace, they should be mindful that their conduct could be evidence in a future legal proceeding where the plaintiff alleges the business was negligent, or even willful and wanton, in failing to protect its employees from infection. Employers should take seriously the requirements in state and local orders, and the guidance of the CDC and OSHA that either require or

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suggest measures like social distancing, limits on gatherings, heightened hygiene and sanitation protocols, screening workers for COVID-19 symptoms, providing employees PPE, preparing an Infectious Disease Preparedness and Response Plan, and other means of keeping its workers and customers safe during the pandemic.

Documents are often compelling evidence during trial, and an employer's policies, and other records of its efforts to control and respond to infection, could be key. Employers should work with counsel to prepare robust policies, plans, and forms addressing their efforts to maintain a safe work environment for its employees. Employers should exercise similar care to implement and document implementation of these policies.

If a claim is received from an employee (or the legal representatives of a deceased employee), the employer should consult with its employment counsel promptly to prepare a strategy for responding. The employer should also promptly turn in notice of any claim to its workers' compensation, employers liability, and general liability insurers, and if possible, should seek a coordinated strategy and response with its insurance carrier.

### Insurance Considerations

An employer's workers' compensation carrier may deny COVID-19 claims on the basis that such infections are not compensable "occupational diseases." Employees whose claims are denied may be more likely to file tort injury or wrongful death claims against the employer, seeking much higher damages than are available from workers' compensation. Insurance coverage and employment counsel can advise employers about the laws in their particular state, and can assist with responding to any insurance claim denials that are inconsistent with their state's law.

If a COVID-19 infection is covered under a workers' compensation policy as occupational disease, the workers' compensation exclusivity doctrine would normally bar lawsuits against the employer alleging negligence and similar conduct as cause of the infection. But if injury or disease is not compensable under workers' compensation laws, the exclusivity doctrine may not block tort or wrongful death actions against the employer. Employers should consider whether they have other liability coverages for civil suits brought by employees for exposure to COVID-19 in the workplace.

For example, employers liability coverage generally apply to lawsuits by employees seeking damages for bodily injury by accident or disease arising out of and in the course of employment when workers' compensation coverage does not apply. Employers liability coverage is sometimes referred to as a "gap filler" because it can provide coverage that would be excluded under workers' compensation and general liability policies. Like workers' compensation coverage, employers liability coverage generally requires that the injury or disease be "caused or aggravated by the conditions of" employment. But state laws concerning workers' compensation coverage do not extend to the employers liability coverage, including statutory definitions of occupational disease that exclude ordinary diseases of life. Employers liability coverage may also apply if a spouse, child, parent, brother or sister of the employee is infected by the employee and brings suit against the employer. Employers liability insuring agreements typically state, for example, that the policy covers "consequential bodily injury" to spouses, children, brothers or sisters of the injured employee, where the damages are the direct consequence of bodily injury arising out of and in the course of the injured employee's employment.

Unlike workers' compensation coverage, employers are not required by law to maintain employers liability coverage. Also, for employers who maintain employers liability coverage, the policies may impose limits for all bodily injury by disease regardless of the number of employees who sustain it (although umbrella and/or excess coverage may apply above the employers liability limit). Employers should, therefore, review their policies to determine if they have employers liability coverage and, if so, the limits and scope of that coverage. For those employers with employers liability coverage, it is typically provided under "Part Two" of a combined workers'

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compensation/employers liability policy. Also, employers must carefully review all proposed policy terms at renewal, including all exclusions to the employers liability coverage.

Tort claims by employees may also allege bodily injury of the type that ordinarily triggers commercial general liability coverage. Standard ISO-form CGL policies, however, contain an "employers liability" exclusion:

"Bodily injury" to:

1. An "employee of the insured arising out of and in the course of:
  - a. Employment by the insured
  - b. Performing duties related to the conduct of the insured's business
2. The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph 1. above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

An employee exposed to COVID-19 at the workplace is not necessarily exposed in the course and scope of their employment. For example, an employee may be exposed while "off the clock" (e.g., retail employee running personal errands in the store) and such exposure should not be deemed as arising out of and the course of employment, or while performing duties related to employment. Given the nature of COVID-19, it will presumably be difficult for an employee to establish where and when exposure occurred. Employers may also face third-party claims from an employee's family due to alleged failure to use reasonable care to protect workers and their families. Such allegations may trigger general liability coverage.

If faced with a lawsuit alleging tort liability, employers should consult with insurance professionals about the scope of the "employers liability" exclusion in the general liability policy, in light of the particular allegations, and – in consultation with their brokers – should consider turning in claims to each of their workers' compensation, employers liability and general liability carriers.

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