

Practical Strategies to Limit Premises Liability Claims Involving COVID-19

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Businesses that open their doors to customers, guests, and other visitors during the pandemic must be vigilant, not only to keep their premises safe to those who enter, but also to avoid lawsuits by individuals who claim they contracted COVID-19 on business premises. The legal landscape surrounding such claims is still somewhat uncertain: Plaintiffs are just beginning to test potential legal theories in this specific context and, with congressional negotiations regarding the next coronavirus stimulus package at a current impasse, the availability of a federal immunity remains unknown. This article describes the current legal landscape, including potential claims that could arise and the current scope of immunity laws, and offers best practices for limiting COVID-related claims based on alleged infection on a business's premises.

Claims that May Arise

A plaintiff who claims to contract COVID-19 on a business's premises is most likely to assert a type of negligence claim called premises liability. Premises liability law varies by jurisdiction, but in general, a plaintiff would have to prove that: (1) COVID-19 infection posed an unreasonable risk of harm on the premises; (2) the business premises owner had notice of the risk; (3) the owner failed to make the premises reasonably safe; and (4) the plaintiff was injured as a result. Depending upon the jurisdiction, plaintiffs may also assert negligence per se, arguing that the defendant violated a statute, rule, or regulation related to COVID-19 and the plaintiff contracted the illness as a result.

Plaintiffs are also testing the boundaries of other, less obvious theories, such as public nuisance, which has already been asserted by employees who claim to have contracted COVID-19 at their workplaces. A public nuisance is generally defined as an unreasonable interference with a right common to the general public. Public nuisance claims traditionally focused on an alleged interference with the use of land, but in recent decades, plaintiffs have pushed the boundaries of public nuisance claims, with mixed rates of success, to address alleged injuries related to asbestos, firearms, climate change, tobacco, and opioids, among other things. Plaintiffs are now apparently trying to further stretch the bounds of public nuisance jurisprudence to include the COVID-19 crisis, as well.

The legal standards for these claims vary by jurisdiction, but in most cases, the defense of these claims will focus in large part on whether the business complied with applicable federal, state, and local guidelines related to COVID-19. These guidelines will likely inform the reasonableness standard of premises liability and nuisance claims and may form the basis for a negligence per se and other tort claims.

The causation element of these claims will pose a major hurdle for most plaintiffs, who will be hard-pressed to prove that they contracted COVID-19 on the premises. In most circumstances, the plaintiff may need to negate one or more other potential sources of infection outside the business premises where the plaintiff could have contracted the disease. This burden is further increased by the current understanding that the disease could be transmitted by non-symptomatic persons and the latency period of the disease is currently understood to vary from 2 to 14 days.

In other words, the plaintiff may need to show that they were not exposed to any source of infection outside the business premises in the 14 days preceding infection. Note, however, that some jurisdictions may apply a lower causation standard to nuisance claims than other traditional tort claims, so defendants must be prepared with a multi-pronged defense to such claims. Improvements in genetic testing and sequencing, applied to the

coronavirus, may help a defendant prove that a plaintiff was not exposed to the virus on its premises, but such improvements could also help a plaintiff identify the source of their infection.

Current Scope of Immunity Laws

Senate Majority Leader Mitch McConnell has pushed for inclusion of a broad, business immunity against COVID-19 claims in the next coronavirus stimulus package. But to date, negotiations have been unsuccessful, and no such federal immunity exists. Businesses must therefore rely on the patchwork of state laws for immunity. At least thirteen states (including Utah, Wyoming, Kansas, Iowa, Oklahoma, Arkansas, Louisiana, Mississippi, Alabama, North Carolina, Georgia, Nevada, and Ohio) have passed legislation or signed executive orders providing broad immunity for COVID-related claims, such as the ones described in this article. Other states (including at least Illinois, Massachusetts, New Jersey, New York, and Arizona) are considering similar legislation. Some state immunity laws are expressly tied to compliance with applicable guidance from federal, state, and local health officials. Therefore, businesses should carefully document their efforts to comply with applicable standards.

None of these immunities are absolute. In most states, for example, the immunity does not apply to willful, reckless, or intentional conduct or to gross negligence.

Practical Strategies to Limit Liability

Regardless of the existence of immunity laws—whose scope is still uncertain and not absolute—businesses should consider implementing the following strategies to defend against potential claims that an individual contracted COVID-19 on their premises.

- **Implement and enforce written coronavirus safety policies in compliance with applicable guidance.** As noted above, a claim involving alleged contraction of COVID-19 on business premises will likely focus, in large part, on whether the defendant complied with applicable federal, state, and local guidance for limiting the spread of coronavirus infection. Where the business premises owner makes good faith efforts to implement and enforce safety measures to control the infection on their premises, it will likely be difficult for the plaintiff to prove their case. Accordingly, businesses must strive to implement the coronavirus safety guidance applicable to their jurisdiction. In that regard, some state OSHA programs have adopted (or are in the process of adopting) coronavirus-specific safety standards for maintaining safe premises, and businesses in those states should ensure compliance with these standards.

Among other things, premises owners must have written safety policies in place, which should be updated to stay current with the applicable guidance from federal, state, and local governments. To ensure that, businesses should designate one or more persons to monitor changes in the applicable guidance. The safety policy must be communicated to employees, who should be trained to follow the rules to limit the spread of coronavirus infection in the premises as per the guidance.

Note that industry-specific guidance is available from federal, state, and local governments for some, but not all, industries. For businesses operating in industries where specific guidance is not available, premises owners should be mindful of the safety standards adopted by the other businesses in their industry. Businesses should also stay abreast of the successes and failures of various safety controls employed in the industry and adapt their safety policies accordingly.

In implementing the various safety controls, business premises owners should be mindful to stay in compliance with various state and federal privacy and discrimination laws.

- **Implement exposure response procedures to handle any incidence of coronavirus infection on the premises.** In addition to safe practices to limit the coronavirus infection in the premises, a business owner's duty of care may include having procedures in place to handle any confirmed or suspected case of the disease on the premises, consistent with the applicable guidance, including closing off areas used by the person who has been or is suspected to be exposed to coronavirus, cleaning and disinfecting those areas, and performing contact tracing to identify other persons at the premises who may have also been exposed. Businesses should have a written coronavirus exposure plan in place to address any incidences of infection on the premises and continued safety of all persons on the premises.
- **Require third parties at the premises to comply with the business premises' coronavirus safety policy.** Businesses must require third parties such as customers, clients, and contractors present in the premises to follow the business' coronavirus safety rules. Among other things, businesses should require all visitors in the premises to wear a face mask. Additionally, businesses should seek assurance, in writing, from contractors that their employees will comply with the coronavirus safety rules while at the premises.
- **Document compliance with and enforcement of the coronavirus safety policy in the premises.** Businesses should carefully document their coronavirus safety policies (including updated versions over time); efforts to train employees and contractors regarding the policies; and enforcement of the policies. Businesses should also maintain documentation reflecting governmental and/or industry standards related to coronavirus prevention. It is important to maintain date-stamped versions of all such internal and external documents, which will inevitably change over time as additional information about the virus becomes available. To the extent it is infeasible to implement any applicable safety guidance, businesses must document steps taken to attempt to implement such measures, reasons for infeasibility, alternative means of protection explored by the business, and any alternative safety means implemented. Such documents could be critical, not only to defeat a claim of breach of duty of care, but also to serve as strong evidence to counter an argument that the premises owner's failure to comply with the applicable safety guidance caused the plaintiff's disease.

Regarding the causation element, a defendant premises owner may defend against it, at least in part, by showing evidence of compliance with the applicable coronavirus safety rules in its premises during the past 14 days, evidence that no person with symptoms of coronavirus infection was allowed access to the business premises during the 14-day period, and evidence that there were no known instances of infection during that time-period. To the extent there were any instances of infection at the premises, businesses should have documentation to show how such instances were handled in a safe manner, consistent with applicable guidance, to prevent exposure of persons like the plaintiff. In that regard, and to the extent appropriate under the circumstances, care should be taken to preserve privilege of any root cause investigation of the cause of any coronavirus case in the premises.

- **Obtain written waivers of liability and indemnification agreements.** All third parties entering the premises should be informed, in writing, that while the safety measures may limit the exposure to coronavirus infection, they are not a guarantee against exposure. Businesses should consider having third parties sign a waiver of liability related to potential coronavirus-related claims. While the enforceability of such a waiver may vary by jurisdiction, the waiver may serve as evidence that the party had notice of the potential risk of exposure to coronavirus infection and assumed the risk of exposure before entering the premises.

In addition, contractors of the premises owner should be provided written notice that the business premises owner takes no responsibility for the safety of employees of contractors and that the safety of these persons is the responsibility of the contractor. Businesses should consider requiring contractors to agree in writing that the contractors will indemnify the business premises owner for any coronavirus-related claims by the contractor's employees.

- **Consider removal of lawsuit to federal court.** Some businesses facing coronavirus lawsuits in state courts are removing cases to federal court based on diversity jurisdiction or federal question jurisdiction allegedly arising from federal OSHA or other directives central to plaintiff's claims. Generally, considering the higher pleading standard and stringent discovery rules in federal courts as compared with state courts, business premises owners facing coronavirus lawsuits should consider whether removal to federal court would be prudent in their specific circumstances.

Finally, please note that employers have specific obligations to their employees related to workplace safety. Please consult your legal counsel to properly address these issues.