Protecting Your Company from Coronavirus-related Premises Liability Claims

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PRACTICES OSHA, Employment Litigation, Labor and Employment, Litigation

Businesses preparing to reopen amid the coronavirus pandemic and the essential businesses that have remained open through the pandemic should make a good faith effort to implement health and safety measures recommended by the federal, state, and local authorities to protect themselves from potential premises liability claims from third-parties such as customers and other non-employees entering the premises. In a premises liability action related to coronavirus, a claimant would likely need to prove that (1) coronavirus infection posed an unreasonable risk of harm on the premises; (2) the premises owner had notice of the risk; (3) the owner failed to make the premises reasonably safe; and (4) the claimant was injured as a result.

The standard for the duty of care in a premises liability case may vary by jurisdiction. In Texas, a person who enters the premises with the owner's knowledge or permission (an invitee or a licensee) is owed a duty of care to maintain the premises in a reasonably safe condition. This duty of care includes the duty to inspect the premises for dangerous conditions that a reasonably careful inspection would reveal. Similarly, in New York, businesses have a duty of care to eliminate dangerous conditions and maintain safe premises.

While there may be no precedent or specific guidance from courts on the standard for maintaining premises regarding coronavirus, premises owners should expect that courts may use the governmental guidance for containing the spread of coronavirus infection in their jurisdiction to define the standard of the required duty of care. Thus, it would be prudent for owners to factor in the guidance and recommendations from the various federal, state, and local institutions for preventing or minimizing coronavirus infection.

Owners may consider implementing a protocol aligned with the current guidance for maintaining a safe environment to protect individuals who might be present in the premises. Among other things, owners may consider:

- Performing temperature screenings of all individuals desiring to enter the premises and restricting access to those who show a temperature higher than 100 degrees Fahrenheit.
- Requiring all persons present in the premises to wear masks or cloth face coverings in accordance with guidance from the Centers for Disease Control and Prevention.
- Requiring social distancing by all individuals present in the premises and making accommodations to facilitate social distancing; for example, using floor stickers to ensure 6-feet distance between individuals standing in a line.
- Requiring good hygiene and sanitation practices by all individuals present in the premises.
- Displaying posters in visible locations emphasizing the required safety measures.

In addition, owners may consider performing tests for coronavirus infection on all individuals who agree to voluntarily submit to such testing before entering the premises and restricting access to those who test positive for infection. However, any decision to do that should be made subject to careful consideration of the legal issues such as privacy that might be implicated in testing third-

parties. In the employer-employee context, the Equal Employment Opportunity Commission has authorized employers to administer coronavirus testing on employees before allowing them to enter the workplace, assuring employers that such a practice did not violate the Americans with Disabilities Act ("ADA"). The testing is required to be subject to conditions including a requirement to follow ADA confidentiality rules and ensuring that the tests are accurate and reliable.

In sum, owners should stay current with the evolving guidance from the federal, state, and local governments for containing the spread of coronavirus infection. With respect to reopening of the businesses, each state is expected to implement a plan for their specific jurisdictions. Companies should make a good faith effort to follow the specific guidance for reopening to maintain safe premises and contain the spread of coronavirus infection. Evidence of such good faith efforts to prevent and contain the spread of coronavirus infection in the business premises could help counter premises liability claims.

It is worth noting that in a premises liability case, the claimant will likely have a substantial hurdle proving that he contracted his infection at the accused premises. Indeed, the Occupational Safety and Health Administration ("OSHA"), that governs the employer-employee relationship, has recognized that "in areas where there is ongoing community transmission, employers . . . may have difficulty making determinations about whether workers who contracted COVID-19 did so due to exposures at work." To that end, OSHA relaxed the burden on employers to make work-relatedness determinations (required for injury reporting purposes under OSHA), except where there was "objective evidence," such as spread of infection among individuals who worked closely together, and such "evidence was reasonably available to the employer." Thus, based on OSHA's perspective at least, the claimant's burden to show that he was infected at the accused premises will not be trivial in most cases. It remains to be seen whether courts would apply OSHA's reasoning in a premises liability case.

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