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MITIGATING CIVIL LIABILITY FOR CALIFORNIA COVID-19 WORK EXPOSURES

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As we enter the tenth month of this pandemic, it is becoming increasingly clear that life must, and will, return to some degree of post-pandemic 'normalcy' in order to ensure our economic survival.

At the same time, managing and mitigating the risks associated with COVID-19 become increasingly critical to avoiding a second wave, and ensuring the viability of economic reopening. This will likely be true even if a 'silver-bullet' vaccine becomes widely available.

Therefore, it is vital that employers be mindful of the potential COVID-19 related claims and ensure steps are taken to mitigate their impact.

Legal claims may emanate from both employees and non-employees, including their relatives or customers.

This article provides an overview of these various risks.

Employee Claims

Employee claims break down into three broad categories: (a) industrial claims that are subject to the exclusive remedy doctrine, (b) industrial claims that are an exception to the exclusive remedy doctrine, and (c) serious and willful claims.

Employee Claims Subject to the Exclusive Remedy Doctrine

The exclusive remedy doctrine's genesis was the 1917 Workers' Compensation Industrial Safety Act (later codified as Labor Code section 3600). It precludes employees from suing their employers in civil court and makes the workers' compensation system the *exclusive* remedy for all job-related injuries. The doctrine was a tradeoff between a fault-based system, i.e., civil lawsuits, and a no-fault workers' compensation system. The only condition being that the injury arose out of the employment or while in the course of that employment.

Senate Bill 1159 – signed into law by Governor Newsom on September 17, 2020 -- and immediately took effect as Labor Code sections 3212.86, 3212.87 and 3212.88 -- applies to peace officers, firefighters, certain healthcare workers, or to employers with more than five employees where there has been an outbreak, and defines injury to include illness or death resulting from COVID-19.

It creates a disputable presumption that the injury arose out of and in the course of employment. The bill makes a COVID-19 illness presumptively compensable after 30 or 45 days, rather than 90 days. Though the bill has a sunset provision of January 1, 2023, it will have a significant impact on employer exposure for the foreseeable future. A detailed analysis of SB 1159 can be found here.

Likewise, AB 685, also signed into law by Governor Newsom on September 17, 2020, which goes into effect January 1st of 2021, imposes stringent reporting requirements for employers when they identify hazards threatening immediate and serious physical harm related to COVID-19. The new law imposes citations and penalties for violating its provisions. AB 685, amends Labor Code Sections 6325 and 6432, and adds Section 6409.6. It too has a January 1, 2023 sunset provision, so its impact will be felt for the foreseeable future. A detailed analysis of AB 685 can be found here.

COVID-19 -related claims will be part of doing business in California for the foreseeable future. Mitigation measures employers take now to minimize the risk of exposure in the workplace will go a long way towards defending against job-related COVID-19 claims.

Employee Claims That Are Exceptions to the Exclusive Remedy Doctrine

There are five exceptions to the exclusive remedy rule: (1) power press, (2) employer assault or ratifications, (3) dual capacity, (4) fraudulent concealment; and (5) an uninsured employer. The last three can be potentially used for COVID-19 related illnesses.

(a) Dual Capacity. If an employee is injured during non-work-related activity or in their capacity as a customer, for example, they can sue the employer in civil court. For example, an employee may claim they contracted COVID-19 because the employer had no mechanism to check its employees for COVID-19 and the employee was exposed to the virus in the employee breakroom, prior to clocking in, or, after clocking out, was shopping at the employer's facility as a customer.

(b) Fraudulent Concealment. If an employer is aware there are infected employees on the premises and conceals that fact from other employees, and fails to provide notifications required by AB 685, or provide contact-tracing, the employer can be sued in civil court, and it may not be able to use the exclusive remedy rule as a defense.

(c) Uninsured Employer. An employer that is not permissibly self-insured, or does not carry workers' compensation insurance, pursuant to Labor Code section 3706 may be sued in civil court. This of course applies to all work-related injuries, not just COVID-19.

Employees' Serious and Willful Claims

This remedy is analogous to punitive damages in civil cases. The amount of compensation recoverable is increased by 50% of all species of benefits paid in connection with the claim, together with costs and expenses not to exceed $250, if an employee is found to have been injured due to the employer's serious and willful misconduct. (Labor Code section 4553).

The employer may be found to have violated a safety order, or, the employee establishes that the employer (1) knew of the dangerous condition; (2) knew that the probable consequence of its continuance would involve serious injury to the employee; and (3) deliberately failed to take corrective action. If the employee successfully proves a violation of a safety order, or elements (1) through (3), they then must prove that their injury was caused by the employer's serious and willful conduct.

At this point, any employer who does not implement some modicum of safeguards consistent with federal, state and local guidelines, may very well be found guilty of a serious and willful misconduct if the employee can prove their illness was related to their employment. With the disputable presumption that SB 1159 creates, that has become an easier task for employees.

Non-Employee Claims

Non-employees, including employees' relatives and acquaintances, employees of other vendors who frequent the employer's jobsite, and customers, are not constrained by the exclusive remedy doctrine, or even the 50% cap on serious and willful violations. Non-employee damages are both economic, e.g., lost past and future income, past and future medical expenses, and life care expenses, and non-economic, such as pain and suffering and loss of affection, comfort and society (for spouses).

Employees who are infected through their employment may spread the infection at home to their family and friends. Vendor employees and customers can likewise be infected if they patronize a business that has not instituted basic safeguards.

It is anticipated that the vast majority of the claims will be asserted under a general negligence cause of action, or, where a specific law or ordinance can be shown to have been violated, under a negligence per se claim as well.

- Negligence Per Se

Negligence in this context is the failure to use reasonable care to prevent harm to others. Negligence can be the doing of an act or the failure to act. The metric to determine if a party was negligent is the reasonably careful person standard. This is a broad standard and will naturally be driven by the facts of each case. The starting point of any analysis, however, will be what steps the employer had taken to prevent the transmission of COVID-19 in the workplace. If not even a modicum of effort had been taken, the breach of the reasonably careful person standard will be that much easier to prove.

Negligence per se creates a rebuttable presumption that the violation of a statute, regulation or ordinance was a negligent act if it can be proven that

(a) the employer violated the law
(b) the injury was of the type that the law was designed to prevent, and
(c) the person injured was one of the class of persons the law intended to protect.

Look for AB 685 to form the basis for a slew of negligence per se lawsuits.

- Substantial Factor

Whether the claim is based on negligence or negligence per se, the claimant must prove that the act, or failure to act, or violation of the law was a 'substantial factor' in causing the harm. Substantial factor is a factor that a reasonable person would consider to be more than a remote, or trivial, factor that contributed to the harm.

- Mitigation Efforts Are Essential

An employer that has taken steps to mitigate the spread and exposure to COVID-19 will make it much more difficult for any plaintiff to prove that the employer's act was a substantial factor in causing their illness and harm, especially since it is very likely the person was exposed to many other potential sources of the virus, unrelated to the employer's facility. Conversely, an employer who has not taken any steps to mitigate and manage the exposure and spread of the virus, and who, for example, has violated the reporting requirements of AB 685, is essentially handing the claim over to the plaintiff on a silver platter.

- In The Courts Right Now

There are a few attempts to broaden the employer exposure beyond the negligence and negligence per se causes of action. In *Hernandez v. VES McDonald's,* Alameda County Superior Court, Case No. RG20064825, for example, plaintiffs, both employees and non-employees, are asserting causes of action for Public Nuisance, Unfair and Unlawful Business Practices, violation of the Oakland Emergency Paid Sick Leave Ordinance, Oakland Paid Sick Leave Ordinance, and Declaratory Judgment.

It remains to be seen how far this lawsuit will go, but fundamentally, the causes of action assert the employer's failure to take steps to prevent or mitigate the spread and exposure to COVID-19. The Complaint lists the following failures as the basis for the suit:

> "These wrongful policies and practices include, but are not limited to:
>
> (1) instructing workers with COVID-19 symptoms to continue working even when obviously highly contagious;
>
> (2) failing to adopt and enforce precautionary measures such as social distancing, to provide employees with sufficient and adequate personal protective equipment ("PPE") such as face masks and gloves;
>
> (3) failing to regularly and adequately sanitize and clean commonly used equipment, bathrooms, and high-touch surfaces;
>
> (4) failing to instruct symptomatic workers and co-workers who came in close contact with them to self-quarantine, with sick pay, for at least 14 days, and
>
> (5) when workers have actually tested positive for COVID-19, failing to conduct even the most basic contact tracing or providing timely or adequate

notifications to co-workers who were in close contact and are thus at heightened risk of contracting COVID-19 and transmitting it to others.

Defendants' failure to provide any mechanism for workers with COVID-19 to request to take paid sick leave violated and continues to violate the emergency public health leave laws that the City of Oakland enacted prior to the events at issue here for the specific purposes of protecting its community by arresting the spread of COVID-19, protecting the health and safety of individuals who have contracted or may contract it, and reducing the enormous drain on public resources caused by virus-related hospitalizations." (Complaint, p.3: 6-21).

Establishing safety guidelines in compliance with Federal, State and local rules and regulations is not only the right and responsible thing to do, but will go a long way in disputing and disproving any claim that a COVID-19 exposure at work, or the employer's facility, caused the illness.

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