

STATES EXPAND LIABILITY PROTECTIONS FOR EMPLOYERS DURING COVID-19

With the recent onset of the global pandemic, employers face increasing uncertainty on the question of whether they may be held liable in tort if their employees fall ill with COVID-19 and claim that they became sick at work. Given the unpredictable and sometimes devastating effects of the illness, they have good reason to be worried. While a large segment of the country's non-essential workforce has been working from home for most of the spring, state and local governments have been starting to ease lockdown restrictions in recent weeks, and thousands of employees will return to their offices and workspaces this summer and fall.

Unfortunately, federal, state, and local guidelines for employers to protect their workers from illness are not always clear and do not always agree on the proper workplace safety measures that employers should implement. As a result, employers are rightfully concerned that they may be exposing themselves to liability when they open their doors back up to their workers in the coming weeks and months.

Discussions around legislative measures to insulate employers from tort liability for illness-related lawsuits during the pandemic have been heating up at both federal and state levels. In May, the U.S. Senate Judiciary Committee discussed the need for Congress to shield employers from COVID-19 lawsuits. During the hearing, business owners testified that it would be nearly impossible to guarantee that all workers remain safe from potentially acquiring the virus, and that the fallout from introducing certain safety measures—like closing stores or sending all potentially affected employees home to quarantine for 14 days—could have devastating effects on their businesses. Those business owners agreed that immunity for a fixed period during the economic reopening could save businesses that might otherwise not be able to survive legal action.

Though the federal government has considered the matter, and several Senators and Congressmen are seeking to attach business immunity from COVID-19 lawsuits to a future economic stimulus bill, it is more likely that legislative measures will be passed in the states before any federally mandated protections for employers are recognized. So far, seven states have passed laws or executive orders that grant business immunity from civil liability: North Carolina, Oklahoma, Utah, Wyoming, Alabama, Arkansas, and Louisiana.

In North Carolina, a COVID-19 relief package was approved by the Governor on May 4. The law initially provided immunity to any business or entity deemed "essential" in the State's emergency orders issued in March, but later expanded to include many more businesses, such as dine-in restaurants. Immunity will continue until emergency orders expire or are rescinded.

Oklahoma's bill, signed into law on May 21, offers broader protections than North Carolina's. It immunizes everyone from liability for any claim by a person who was exposed to COVID-19, as long as no laws were violated and the accused person or business followed official safety guidance. Another bill, signed on May 15, provides immunity from product liability claims against people and businesses who manufacture or supply personal protective equipment (PPE) or medications used to treat COVID-19, even in off-label use cases.

Similarly, Utah's bill, signed on May 4, provides to all persons and premises immunity from liability for injury resulting from exposure to COVID-19, unless there was willful misconduct or reckless or intentional infliction of harm. Wyoming's bill, signed into law on May 20, provides immunity from COVID-19 claims to any person or business who acted in good faith and followed safety instructions for the duration of the public health emergency. The bill expires on June 30, 2021. Louisiana's bill, signed on June 16, provides immunity to businesses, government agencies, trade show organizers, and event planners for civil damages from COVID-19 deaths or injuries unless the claimant can prove that there was gross negligence or willful misconduct.

Finally, the governors of Arkansas and Alabama have issued executive orders immunizing businesses from civil liability as a result of exposure to COVID-19. As in the above cases, immunity does not apply to willful, reckless, or intentional conduct. In Alabama, additional business protections prohibit damages from "mental anguish or emotional distress" or punitive damages in circumstances that do not involve serious physical injury.

Additionally, fourteen states—including Utah, Wyoming, and Arkansas—have expanded workers' compensation coverage to include COVID-19-related claims during the pandemic. Nearly all of these states cover healthcare workers and first responders, while others have implemented broader protections for all or nearly all workers (California, Wyoming and Arkansas), essential workers (Illinois), grocery store and postal workers, childcare professionals, and military members (Kentucky), and child safety investigators, corrections officers, and national guard members (Florida). A common approach to extending workers' compensation coverage is to amend state policy such that COVID-19 infections are presumed to be work-related, and thus, covered. This presumption places the burden on the employer and the insurer to prove that the infection was not work-related.

The speedy expansion of workers' compensation coverage and simultaneous contraction of business liability in the face of the pandemic has some workers' compensation insurers wary. Though insurers have not yet seen a large uptick in claims related to COVID-19, this is sure to change in the coming months. So far, some business and insurance groups are calling for the creation of a federal backstop, similar to the Terrorism Risk and Insurance Act enacted after September 11, 2001, or similar state backstops, to take on a share of the costs should workers' compensation systems become overburdened. On a related note, some states including New Jersey, Massachusetts, New York, Louisiana, Pennsylvania, South Carolina, and Ohio, have looked into introducing legislation that could force business interruption insurance providers to cover COVID-19 claims. In some cases, such as in Louisiana, these bills have been shelved due to concerns that they could devastate insurance industries within states.

The list of states that have passed legislative reforms in response to the pandemic continues to grow. At present, Missouri, Ohio, and Arizona are close to passing their own versions of bills immunizing businesses from liability. Many states that have not addressed workers' compensation measures are considering them as well. We will update this article as soon as any additional states pass reforms. If you would like to receive additional information, please contact Ruth Windberg (rwindberg@droellaw.com) or Tim Droel (tdroel@droellaw.com).