

HR Heads-up

PERIODIC UPDATES ON IMPORTANT HR LEGAL ISSUES

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Potential Liability for Organizations Due to the COVID-19 Pandemic

We have received many questions about potential liability as employers reopen operations during the COVID-19 pandemic. This article addresses many of the common issues regarding potential liability.

Worker's Compensation

In most situations, an employee's exclusive remedy for a workplace injury or illness is worker's compensation. If an employee can establish sufficient proof that he/she was infected by COVID-19 at work, the employee will likely be entitled to worker's compensation benefits. To be eligible for worker's compensation benefits, an employee must be injured or become ill (in this case, the injury/illness would be a COVID-19 infection) while the employee is "performing service growing out of and incidental to his or her employment" (i.e. in the course of his/her employment). This can include employees who get infected while traveling for work. The key inquiry is whether the employee's employment placed the employee in the particular place where, and at the particular time when, the employee became ill by a force not solely personal to him or her (such as through COVID-19).

With a contagious disease like COVID-19, it is likely going to be challenging for an employee to prove that he/she was infected during the course of his/her employment, rather than through interactions outside of work. However, as public health agencies increase their capacity for contact tracing (tracking with whom an employee has been in contact while infected), it will be increasingly possible for an employee to prove he/she was infected at work. At this time, proving where and how an employee was infected with COVID-19 will be a challenge from both a legal and scientific perspective.

Employees who meet the statutory definition of "first responder" will have an easier time establishing eligibility for worker's compensation benefits because 2019 Wisconsin Act 185 created a legal presumption that first responders who work closely with persons who have confirmed cases of COVID-19 are presumed to have contracted the illness through their employment.

Some plaintiff attorneys in jurisdictions outside of Wisconsin are filing lawsuits which attempt to get around worker's compensation as an exclusive remedy by claiming that an employee's infection was caused intentionally by an employer through the employer's intentional disregard of safety protocols. If an injury is caused by the intentional acts of an employer, the employee may be able to pursue a traditional lawsuit in court against the employer. In such a lawsuit, the employee can generally seek greater damages than those available through the worker's compensation system. However, proving that an employer intentionally caused an infection, especially through an intentional disregard for safety protocols, will generally be very difficult for employees to prove.

Civil Liability Issues

Organizations also face potential liability from clients, customers, and other third parties if they are infected by COVID-19 due to the actions (or inactions) of organizations. Third party injuries (as opposed to employee injuries) are not covered by the worker's compensation system, although such injuries might be eligible for coverage under organizations' insurance policies. A third party might sue an organization in court if he/she believes an organization's action (or inaction) caused the individual to contract COVID-19. Such a lawsuit might be based on the organization's failure to provide a safe space for third parties, or an organization's failure to follow a legal requirement regarding safety. However, in order to prevail, the third party will have to prove that the organization's action (or inaction) caused the third party to contract COVID-19. As discussed above, proving causation will be challenging given that it is currently scientifically difficult to specifically identify the source of an individual's infection.

Additionally, the extent of the duty of care an organization owes to third parties is uncertain during this pandemic. A specific legal obligation, such as a local public health order closing nonessential businesses, likely creates a duty of care. Violating such a legal obligation could lead to potential liability if causation can be proven. Less certain is whether a recommendation from a health agency (such as from the federal Centers for Disease Control and Prevention (CDC), Wisconsin Department of Health Services, or local public health agencies) creates a duty that organizations must follow to avoid liability. A jury or factfinder might hold that a reasonable organization would have followed certain recommendations from certain public health agencies, leading to potential liability for the organization if causation can be proven.

There have been proposals among legislators at the federal level to create immunity from liability for organizations that reopen during the pandemic. However, no such law providing such immunity has been passed, and it is uncertain if such a law will ever pass. Therefore, organizations should not rely on potential legislative immunity as they consider reopening.

Conclusion

To limit potential liability, organizations have to carefully assess their workplaces and create reasonable and practical policies and procedures to ensure that their premises are as safe as possible under the circumstances and in light of applicable legal obligations and public health agency recommendations. Additionally, organizations will want to consult with their insurance carriers to ensure coverage in the event that COVID-19 legal claims are filed. Finally, the Boardman Clark Labor & Employment team is available to consult with employers regarding how to assess and manage their potential liability.

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