

OSHA Complaints and Wrongful Death Suits: Defending Claims Arising Out of COVID-19 Exposure in the Workplace

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Overview of Webinar Topics

- Responding to OSHA Complaints
- CAL-OSHA Update
- Employer Liability for Employee Injury/Death from COVID-19



Responding to OSHA Complaints

JOHN HO



OSHA: COVID-19

- No specific federal OSHA standard covering COVID-19.
- The General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health (OSH) Act of 1970, 29 USC 654(a)(1), requires employers to furnish to each worker “employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”
- Future federal OSHA Emergency Rule Making? Not likely.

State Safety Measures

- Virginia – On July 27, first state to adopt COVID-19 related workplace safety mandates. Prohibits workers suspected of having COVID-19 from showing up to work, requires companies to notify workers of possible exposure to infected co-workers within 24 hours and includes mandates about physical distancing, protective gear sanitation, disinfecting and hand-washing and also prohibits retaliation against workers who air concerns about infection risks on the job with each other, government agencies, traditional news outlets or social media.
- Set to expire six months after effective date.

OSHA Guidance

- Guidance on Preparing Workplaces for COVID-19
<https://www.osha.gov/Publications/OSHA3990.pdf>
- FAQ's <https://www.osha.gov/SLTC/COVID-19/COVID-19-faq.html>
- Guidance on Returning to Work
<https://www.osha.gov/Publications/OSHA4045.pdf>
- Industry Specific Guidance <https://www.osha.gov/SLTC/COVID-19/controlprevention.html#interim>

OSHA Recordkeeping Requirements

- Employers with more than 10 employees during the previous calendar year are required to keep a record of serious work-related injuries and illnesses.
- Certain low-risk industries are exempt.
- North American Industry Classification System (NAICS Code).

<https://www.osha.gov/recordkeeping/ppt1/RK1exempttable.html>

https://www.osha.gov/recordkeeping2014/faqs_records.html

OSHA COVID Recordkeeping Guidance – May 19, 2020

- COVID-19 is a recordable illness, and employers are responsible for recording cases of COVID-19, if the case:
 - Is confirmed as a COVID-19 illness as defined by the CDC;
 - Is work-related as defined by 29 CFR 1904.5; and
 - Involves one or more of the *general recording criteria* in 29 CFR 1904.7, such as medical treatment beyond first aid or days away from work.

<https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-COVID-19>

OSHA Recordkeeping Guidance – May 19, 2020

- In most cases, OSHA states that an employer can satisfy its work-related analysis by doing the following:
 - Ask the employee how he believes he contracted COVID-19.
 - While respecting employee privacy, discuss with the employee his work and out-of-work activities that may have led to the COVID-19 illness.
 - Review the employee's work environment for potential SARS-CoV-2 exposure. This should include reviewing information of other employees in the workplace contracting COVID-19, *i.e.*, whether there is a cluster of employees testing positive and their level of contacts with each other.

OSHA Recordkeeping Guidance – May 19, 2020

Evidence Supporting Work-Relatedness:

- Several cases developing among workers who work closely together and there is no alternative explanation. Alternative explanations might include that the employees live-together and/or commute together.
- If contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation.
- If the employee's job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.

OSHA Recordkeeping Guidance – May 19, 2020

Evidence Against Work-Relatedness:

- If the employee is the only worker to contract COVID-19 in her vicinity and her job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
- If the employee, outside the workplace, closely and frequently associates with someone (*e.g.*, a family member, significant other, or close friend) who (1) has COVID-19; (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious.

OSHA Recordkeeping Guidance – May 19, 2020

- If after a reasonable and good faith inquiry, the employer cannot determine whether it is *more likely than not* that the exposure in the workplace played a casual role with respect to a particular case of COVID-19, the employer does not need to record that COVID-19 illness.
- Health Care – Difficult to challenge work-relatedness.
- Non-Health Care – Closely examine “clusters” of cases.
- Workers’ Compensation filing is not relevant to whether a COVID-19 case is recordable.

Privacy Issues

- If required to record, cases should be recorded as a “respiratory illness.”
- May exclude the employee’s name if the “employee voluntarily requests” that his/her name not be entered on the log.
- Thus, employers should ask the employee whether he/she would like his/her name redacted from the OSHA log. If so, the employer should enter “privacy case” in the space normally used for the employee’s name and additional record keeping obligations will be triggered, *e.g.*, keeping a separate, confidential list of the case numbers and employee names for these privacy concern cases.

Severe Injury/Illness Reports: Affirmative Reporting Obligations to OSHA

- All employers are required to notify OSHA when an employee is killed on the job or suffers a work-related hospitalization, amputation, or loss of an eye.
- A fatality must be reported within 8 hours of learning of the fatality if it occurred within 30 days of the work-related incident.
- An in-patient hospitalization, amputation, or eye loss must be reported within 24 hours if it occurred within 24 hours of a work-related incident.

<https://www.osha.gov/report.html>

Examples

- Employee has confirmed COVID-19 test on March 1. Employee's last day of work is the same day. Employer also determines that case is work-related under applicable analysis on the same day. Employee quarantines at home for 10 days. On March 10, employee's condition worsens and he is admitted to hospital for treatment. Employers learns of hospitalization on March 10. Case is not reportable to OSHA, as the hospitalization occurred more than 24 hours after the workplace exposure.
- Employee's last day of work is March 1 and ends at 5 p.m. Employee is admitted to hospital the next morning at 9 a.m. Employee has confirmed COVID-19 test that day (March 2) but results are pending for 3 days. On March 5, COVID-19 test results are confirmed as positive and shared with employer. Employer determines that COVID-19 hospitalization is work-related on March 5. Case is reportable, as the hospitalization occurred within 24 hours of the last workplace exposure.

OSHA Whistleblower Complaints

- U.S. DOL's Office of Inspector General (OIG) found from February 1 to May 31, OSHA received 4,101 whistleblower complaints.
- 30% increase over the same time period last year.
- Of them, at least 1,618 identified as COVID-19 specific (representing 39% of all whistleblower complaints).

OSHA COVID Whistleblower Complaints

- Usually by “Phone and Fax” letter (as opposed to on-site).
- Lack of adequate PPE or failure to implement appropriate safety measures.
- Must respond within five days identifying any problems and noting corrective actions taken or planned.
- Short extensions are typically granted.
- Submit detailed position statement addressing allegations such as photographs of engineering controls, applicable workplace policies, social distancing requirements, tele-work options, employee communication, etc.
- Cite to OSHA COVID-19 guidance including specific industry guidance.
- Consider potential admissions.

OSHA Retaliation Complaints

- Regularly review and strengthen anti-retaliation policies.
- OSHA's Recommended Practices for Anti-Retaliation Programs
<https://www.osha.gov/Publications/OSHA3905.pdf>
- Encourage reporting of health and safety concerns and permit for anonymous or confidential reporting.
- Ensure employees have multiple avenues to raise complaints and clearly communicate them.
- Employees should never be disciplined / terminated for raising or escalating complaints, *i.e.*, make sure you have legitimate, non-discriminatory reasons for any adverse employment actions. Documentation. Application of discipline to similarly situated employees.
- Supervisory and employee training.
- Be discrete. Only share information on a need-to-know basis.

Cal-OSHA Update

WALTER STELLA



Cal/OSHA: Injury and Illness Prevention Programs

- Section 3203 of the California Code of Regulations (8 CCR § 3203)
 - Requires every employer in California to establish, implement and maintain an effective and **written** Injury and Illness Prevention Program (“IIPP”) that includes a system for ensuring that employees comply with safe and healthy work practices and for communicating with employees on all matters related to occupational safety and health; and procedures for identifying and evaluating workplace hazards.
- Employers are required to determine if COVID-19 infection is a hazard in their workplace. If it is a workplace hazard, then employers must:
 - Implement infection prevention measures as part of their IIPP to prevent or reduce infection hazards, such as implementing CDC and California Department of Public Health (“CDPH”) recommended actions
 - Provide training to employees as part of their IIPP on their COVID-19 infection prevention methods.
 - Provide Personal Protective Equipment (PPE), where applicable
 - All employers must provide face coverings to employees or reimburse them for the reasonable costs of obtaining them.

<https://www.dir.ca.gov/dosh/coronavirus/Face-coverings-poster.pdf>

https://www.dir.ca.gov/covid19/FAQs_COVID-19_Safe_Reopening.htm

Resources and Guidance for IPPs and COVID-19

- Cal/OSHA Interim General Guidelines for Protecting Workers for COVID-19 (May 14, 2020)
<https://www.dir.ca.gov/dosh/coronavirus/General-Industry.html>
- Cal/OSHA and Statewide Industry Guidance on COVID-19
<https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html>
 - Links to Industry-Specific Guidance by the CDPH and Cal/OSHA
 - Links to Industry-Specific Webinars by Cal/OSHA's Consultation Services
 - Links to FAQ's –e.g., Safe Reopening FAQhttps://www.dir.ca.gov/covid19/FAQs_COVID-19_Safe_Reopening.htm

Cal/OSHA Recording and Reporting Requirements

- California employers have to **record** work-related fatalities, injuries and illnesses due to COVID-19 on their 300, 300A or 301 logs as they would any other occupational illness. To be recordable, the illness must be work-related and result in one of the following:
 - Death
 - Days away from work
 - Restricted work or transfer to another job
 - Medical treatment beyond first aid
 - Loss of consciousness
 - A significant injury or illness diagnosed by a physician or other licensed health care professional

<https://www.dir.ca.gov/dosh/coronavirus/Reporting-Requirements-COVID-19.html>

Cal/OSHA Recording Requirements (Cont.)

- Is it COVID-19?
 - A positive test for COVID-19 is determinative of recordability BUT
 - A positive test result is not necessary to trigger recording requirements
 - California employers must make recordability determinations even though no testing occurred, or results of testing are not available
 - Cal/OSHA recommends erring on side of recordability
- Is it Work-Related?
 - Injury or Illness is “work-related” if an event or exposure in the work environment either caused or contributed to the resulting condition, or significantly aggravated a pre-existing injury or illness
 - Presumption of work-relatedness if the illness or injury results from events or exposures occurring in the work environment

Cal/OSHA Reporting Requirements

- Eight (8) Hour Window
 - California employers must report to Cal/OHSA any serious illness, serious injury, or death of an employee **that occurred at work or in connection with work** within eight (8) hours of when they knew or should have known of the illness.
 - “Serious illness or injury”: requires inpatient hospitalization for other than medical observation or diagnostic testing.
 - If COVID-19 illness meets the above definition, it is reportable.
 - If employee gets sick at work, it’s reportable whether work-related or not.
 - If employee starts showing symptoms outside of work, employers must report a serious illness if there is cause to believe the illness may be work-related.
 - Cal/OSHA prefers calls by phone but will also accept email reports (Cal/OSHA Accident Report inbox).

Causal Connection to Work?

- Employers must consider the following factors:
 - Multiple cases in the workplace
 - Type, extent and duration of contact employee had at work with other people, particularly the general public
 - Physical distancing and other controls that impact the likelihood of work-related exposure
 - Whether employee had work-related contact with anyone who exhibited symptoms of COVID-19
- *Employers should err on side of reporting the illness to Cal/OSHA*
- Report even if COVID-19 not diagnosed
- Reporting does not mean admitting liability!

Cal/OSHA Complaint Investigations

- **What can employee do if employer is not implementing guidance to protect workers and the public from getting COVID-19?**
 - California employers are required to have a system in place through their IIPP's for employees to communicate with their employer about matters of workplace safety and health. Employees may therefore raise concerns through their employer's pre-designated channels of communication.
 - If needed, employees may also file a complaint with the nearest Cal/OSHA District Office. The name of any person who submits a complaint to Cal/OSHA must be kept confidential by law, unless the person requests otherwise.
 - Discrimination or retaliation against an employee who expresses concern about a safety or health hazard or files a complaint is strictly prohibited. Cal. Labor Code §§6310, 6311.

State Response to COVID-19 & Workers' Compensation

- Expansion of scope of covered “compensable injury or illness” to include COVID-19-related conditions for first responders, healthcare workers, other “essential” employees, etc.
 - Ex. Arkansas, Florida, North Dakota, Washington, and Wyoming
- Creating a rebuttable presumption that an employee’s contraction of COVID-19 arose out of and in the course of employment - this presumption shifts the burden to the employer and insurer to prove that the contraction was **not** work-related.
 - Ex. Alaska, California, Connecticut, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Hampshire, New Mexico, Utah, Vermont and Wisconsin

Employer Liability for Wrongful Death Claims

DAVID BARRON



Federal Liability Protections

Business

Nation's biggest business lobby is behind Republicans' push to shield employers from coronavirus liability

In video, Chamber of Commerce executive says senators 'putting their touches' on group's legislative proposal.

POLITICS

McConnell says he will not negotiate with Democrats on liability protections in coronavirus bill

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The CARES Act and FFCRA collectively provide limited liability protection under federal law to manufacturers and distributors of PPE, and healthcare providers treating COVID-19.

Additional liability protection for employers is stalled in Congress.

Federal SAFE TO WORK Act (S.4317)

- Introduced in the Senate in July, but stalled
- Proposes to create a uniform system / set of rules across all states including:
 - High burden of proof – plaintiff must prove by clear and convincing evidence that:
 - Defendant was not making reasonable efforts in light of all the circumstances to comply with applicable government standards and guidance in effect at the time;
 - Defendant engaged in gross negligence or willful misconduct that resulted in the plaintiff's exposure; **AND**
 - The exposure caused the plaintiff's personal injury.
- Removable to Federal Court
- 1 year statute of limitations (following exposure)
- Limitations on the type of recoverable damages
 - Compensatory damages limited to economic losses
 - Non-economic losses only available when willful misconduct is shown
 - Punitive damages are available if willful misconduct is shown, but cannot exceed the amount of compensatory damages
 - Damages are to be reduced by the amount of any insurance or other compensation the complainant receives

Federal SAFE TO WORK Act (S.4317)

- Limitations on joint and several liability (only where intent to injure or knowing fraud is shown)
- Limits on the scope of discovery in litigation
- Right to interlocutory (immediate) appeal of judge's denial of a motion to dismiss
- Special rules / restrictions for class actions
- Does not supersede "stricter" state laws
 - Therefore, in those states that create "stricter" COVID-19 liability shield laws, the SAFE TO WORK Act would not supersede those state laws and would not cover COVID-related exposure cases in those states.
 - Given the diversity of these laws and the methods through which they seek to accomplish their goal of limiting liability, it remains unclear exactly which states' laws will be considered "stricter" than the SAFE TO WORK Act.
 - This could be an impediment to the goal of nationwide uniformity, and possibly a major obstacle for passage of this law.

Defense Production Act Tort Immunity?

Defense Production Act has not been found to immunize DPA contractors from tort liability, but...

The New York Times

Opinion

Trump's Dangerous Decision on Meatpacking Plants

He is forcing workers to choose between a paycheck and their health.

By Richard Trumka

Mr. Trumka is the president of the A.F.L.-C.I.O.

“President Trump said he would also shield meatpacking companies from legal liability as long as they follow guidelines from the Centers for Disease Control and Prevention and Occupational Safety and Health Administration for the facilities...”



State Liability Protections

**Covid Liability Protection
Enacted In Nine States, With
Tennessee Set To Be Number
10**



State Law Example - Georgia

- Businesses cannot be held liable for damages involving a COVID-19 liability claim, unless the claimant can show that the entity's actions involved "gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm."
- Businesses can create a rebuttable presumption of assumption of the risk by including a waiver on a receipt or posting a warning on the premises' point of entry.
- This law sunsets July 14, 2021
- The law excludes any claims arising under the state's workers' compensation laws, but would be applicable to contractors and third parties.
- Georgia generally does not allow employees to circumvent the exclusive remedy provisions under workers' compensation laws

New State Liability Shield Laws

Georgia	<p>“No healthcare facility, healthcare provider, <u>entity</u>, or individual, shall be held liable for damages in an action involving a COVID-19 liability claim against such healthcare facility, healthcare provider, entity, or individual, unless the claimant proves that the actions of the healthcare facility, healthcare provider, entity, or individual, showed: <u>gross negligence</u>, <u>willful and wanton misconduct</u>, <u>reckless infliction of harm</u>, or <u>intentional infliction of harm</u>.”</p> <p>Creates rebuttable presumption that a claimant assumed the risk of exposure when certain warnings are posted on premises.</p>
Iowa	<p>Claimant cannot sue unless (i) their injury involved inpatient hospitalization or death, (ii) the alleged negligent act was intended to cause harm, OR (iii) involved an act that constitutes actual malice.</p> <p>Also, a premises owner cannot be held liable unless they act with reckless disregard, actual malice, or intentionally cause the exposure.</p> <p>Creates safe harbor (i.e. complete bar against liability) for those who substantially comply or act consistent with federal or state statute, regulation, order, or public health guidance related to COVID-19.</p>

New State Liability Shield Laws

Kansas	Businesses are “immune from liability in a civil action for a COVID-19 claim if such person was acting pursuant to and in substantial compliance with public health directives applicable to the activity giving rise to the cause of action when the cause of action accrued.”
Louisiana	<p>Businesses cannot be held liable for COVID-19-related injuries unless they “failed to substantially comply with the applicable COVID-19 procedures established by the federal, state, or local agency which governs the business operations and the injury.”</p> <p>Specifically says employees who contract COVID and are injured as a result can sue their employer if the exposure was intentional.</p>
Mississippi	<p>Provides that a business that “attempts in good faith to follow applicable public health guidance shall be immune from suit for civil damages for any injuries or death resulting from or related to actual or alleged exposure or potential exposure to COVID-19”</p> <p>However, immunities provided by the law, “shall not apply where the plaintiff shows, by clear and convincing evidence, that a defendant, or any employee or agent thereof, acted with actual malice or willful, intentional misconduct.”</p>

New State Liability Shield Laws

North Carolina	Creates temporary immunity for “essential businesses” (defined by an executive orders) and “emergency response entities” unless those businesses or entities were grossly negligent, reckless or intentionally caused the specified harm.
Oklahoma	“A person or agent of the person who conducts business in this state shall not be liable in a civil action claiming an injury from exposure or potential exposure to COVID-19 if the act or omission alleged to violate a duty of care of the person or agent was in compliance or consistent with federal or state regulations, a Presidential or Gubernatorial Executive Order, or guidance applicable at the time of the alleged exposure.”
Utah	Businesses are "immune from civil liability for damages or an injury resulting from exposure of an individual to COVID-19," that occur on their premises, but not if the exposure was caused by the business's "willful misconduct; reckless infliction of harm; or intentional infliction of harm."
Wyoming	Businesses that follow their state, city, town or county health officer in good faith is immune from liability, but, “this immunity shall not apply to acts or omissions constituting gross negligence or willful or wanton misconduct.”

What About Employee Waivers?

- Asking employees to sign waivers of COVID-19 liability as a condition of employment is not advisable for the following reasons:
 - Such waivers are generally void as a matter of public policy to the extent they seek to compel an employee to waive rights under a state workers compensation system.
 - In most states, the only claims available outside workers compensation benefits would be based on grossly negligent or intentional acts by the employer. If the employee could meet this evidentiary showing, a waiver would likely not be enforced.
 - The optics of requiring an employee to waive injury claims against the employer could be harmful not only in a wrongful death lawsuit, but in other employment disputes involving COVID-19 or agency investigations (i.e. OSHA).

WC Exclusive Remedy and Exceptions

- Employees are generally barred from suing their employers who carry WC insurance for on-the-job injuries. In exchange for the right to sue, employees get quick (and automatic) access to WC benefits
- But... some states do allow employees to sue their employer for certain egregious acts or omissions:
 - **New York** - requires that the employer fully intended to cause the injury
 - **Pennsylvania** - requires the act of the employer to not be work-related and rise truly to the level of an intentional wrong, such as a fraudulent misrepresentation or an intentional physical assault
 - **California** - requires intentional conduct, such as physical assault, or fraudulent concealment (i.e. concealing an injured worker's injuries)
 - **Texas** – requires intentional conduct OR gross negligence but only when that conduct causes an employee death.

WC Exclusive Remedy and Exceptions

- Employers should be on the lookout for civil claims using these “carve outs” – i.e. the employer engaged in egregious conduct and the WC exclusive remedy does not apply
- Potential claims include:
 - Intentional failure to follow and enforce federal, state or local guidelines on prevention of COVID-19,
 - Intentional failure to provide necessary PPE, or
 - Fraudulent concealment of the fact that an employee has been exposed to someone diagnosed with COVID-19

We are already seeing the first wave of filings...

DAILY SOUTHTOWN SUBURBS

Family of Evergreen Park Walmart employee who died of COVID-19 complications files wrongful death lawsuit

The suit, filed on behalf of the family of Wando Evans, alleged negligence and wanton misconduct and reckless disregard, including gross negligence, in [the death of Evans, an overnight stock and maintenance associate at the Evergreen Park Walmart store.](#)

The Counter
Families of workers who died of Covid-19 about outbreak

The Mercury News
News > Crime & Courts
Coronavirus: Widow sues Safeway for wrongful death of husband after virus outbreak
Pedro Zuniga worked at distribution center in Tracy

by H. Claire Brown
06.29.2020, 2:10pm

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By ANGELA RUGGIERO | aruggiero@bayareanewsgroup.com | Bay Area News Group
PUBLISHED: June 4, 2020 at 1:12 p.m. | UPDATED: June 5, 2020 at 3:45 a.m.

Wrongful Death Lawsuits



Cases

Location	Total cases ↓	New cases (last 60 days)	Cases per 1M people	Recovered	Deaths
Worldwide	27,605,560		3,550	18,565,072	898,269
United States	6,354,614		19,282	3,479,838	189,961
Texas	670,587		24,213	553,409	13,857
Harris County	112,039		26,798	No data	2,342
Dallas County	77,326		32,006	No data	1,011
Bexar County	47,748		27,189	No data	1,167
Tarrant County	43,055		23,275	No data	639
Hidalgo County	28,833		36,140	No data	1,311
Travis County	27,124		25,513	No data	399
Cameron County	21,802		52,646	No data	819

- What percentage of the deaths in the United States were working Americans?
- Of those worker fatalities, how many worked in front line jobs where they may have been exposed in the workplace?
- Of that smaller number, how many families are likely to blame the employer, at least in part, and file a wrongful death lawsuit?

Data current as of 9/9/20

Defending a Wrongful Death Case

- Defending an employee wrongful death case arising out of COVID-19 will center on two primary questions:
 - **Causation** – i.e. did the employee contract COVID-19 in the workplace
 - **Culpability** – i.e. did the employer act with the required intent (different from state to state and ranging from gross negligent to intentional conduct)

Lessons Learned and Best Practices

- Pay close attention to the investigation of employee COVID-19 cases for purposes of the OSHA-300 log. Treat every case like it could be a fatality and the documentation will be scrutinized by a jury.
- Document the timeline surrounding every employee case. Did the employee's spouse get sick first? Did the employee tell coworkers she had been traveling? Retracing these steps later will be next to impossible and memories will fade.
- Include in-house counsel on any internal communications once the employer is on notice of an employee fatality or possibility of employee litigation.
- Designate a COVID-19 officer within your organization to document the employer's efforts to protect employee health and safety. Take pictures of environmental improvements and keep notes from employee meetings. This file will be useful in a number of contexts, including not only a lawsuit, but also responding to an OSHA complaint.