

# Workers' COVID-19 Injury Claims May Not Hold In Court

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As the death toll from COVID-19 continues to rise across the country, it is expected that the number of lawsuits relating to the virus will soon rise as well. Families dealing with unimaginable loss have been left with unanswered questions about the virus — wondering what more could have been done to protect their loved ones against the spread of COVID-19 — and whether their family members' employers can be held accountable.

While many sectors of our economy have been able to transition to remote work arrangements, millions of essential businesses have remained open throughout the ongoing health crisis, and their employees have had to work.

These include employees such as supermarket and pharmacy clerks, workers at meat processing plants, and many other employees who very likely never imagined that they would be on the front lines during a global pandemic. Employees and their families question what steps have been taken to ensure their safety and what omissions have left them more vulnerable.

Our nation's largest private employer, Wal-Mart Stores Inc., has recently been named as a defendant in a wrongful death lawsuit brought by the family of a former employee who died of complications related to the coronavirus. Cruise lines and long-term care facilities have also been the target of lawsuits alleging that the companies failed to take necessary steps to protect employees in the face of known risks associated with the virus.

## Most Employee Claims Will Be Addressed Through the Workers' Compensation System

Typically, claims for work-related injuries and illnesses are handled through workers' compensation insurance. Workers' compensation coverage is mandated in each state and typically includes compensation for medical expenses and lost wages for employees who are injured or become ill in the normal course of, and as a direct result of, their employment. It may also provide damages for specific injuries or death.

The workers' compensation model was adopted in the early 20th century as a way of guaranteeing benefits for injured workers. In exchange for providing this insurance which guarantees benefits, employers will generally not be held liable for damages in civil lawsuits brought by employees based on their work-related injuries.

In other words, workers' compensation is the employee's exclusive remedy. Most states still allow workers to sue for damages where the employer's conduct was intentional or deliberate. In some states, the standard is lower: Employers can be liable for damages where they have been grossly negligent.

Families of people who died from COVID-19 may find it difficult, however, to collect workers' compensation benefits. For example, in New York, claimants must show that the injury "arose out of and in the course of the employment" and also that there was a causal connection between the injury and the employment.<sup>[1]</sup>

Claimants may face an uphill battle satisfying these tests. Even with a confirmed COVID-19 diagnosis and anecdotal evidence of fellow employees who contracted the disease, so much is unknown about COVID-19, particularly its incubation period, that it will be difficult to establish causation. Likewise, because COVID-19 is highly contagious, it may be challenging to prove that the disease was contracted during the course of employment, as opposed to outside the workplace.

The New York Workers' Compensation Board has denied claims for infectious disease exposure in the absence of definitive evidence linking the illness back to the employer. Even claims brought on behalf of medical providers and first responders for respiratory illnesses and bacterial infections have been rejected in the absence of definitive evidence of exposure at work, or when the illness is considered common in society and not unique to the workplace, such as COVID-19.[2]

Some states, including New York, are considering regulatory and/or statutory changes that will make it easier for employees to show that they contracted coronavirus from their jobs. Many of these efforts are aimed at first responders and front-line medical personnel, but some are broader.

For example, on May 6, California Gov. Gavin Newsom issued an executive order creating a rebuttable presumption that an employee's COVID-19-related illness arose out of the course of employment for purposes of obtaining workers' compensation benefits. A similar rule was adopted by the Illinois Workers' Compensation Commission, but an Illinois judge issued a temporary restraining order blocking the rule, and it was repealed.

## **Employees Are Likely to Sue in Court to Bypass Workers' Compensation**

Workers' compensation often caps damages based on employees' wages. Some states have designated damages for particular injuries, or even death. Employees and their families are therefore likely to bring suits in court where they can be awarded greater damages and possibly leverage negative publicity.

In most states, such as New York, however, workers and their families cannot bring lawsuits and avoid the exclusive remedy of workers' compensation based on conduct that was merely negligent — employers are only liable for damages if their conduct was intentional or deliberate. In New York, to establish that the employer's conduct was intentional or deliberate, an employee must demonstrate that the conduct was "engaged in with the desire to bring about the consequences of the act." [3]

It is highly unlikely that workers' families will be able to prove that employers desired that their employees contract COVID-19. In other states, the test might be different and perhaps easier to satisfy.

In *Evans v. Walmart Inc.*, the family of the deceased Walmart employee has alleged that Walmart failed to enforce social distancing guidelines, properly sanitize the store, provide sufficient personal protective equipment for employees, address the health concerns of workers with COVID-19 symptoms, or warn employees that they might be exposed. In Illinois, where the suit is pending, employees can only bring a damages lawsuit against an employer if they can prove intentional conduct.[4]

In an attempt to get around this requirement, the deceased worker's family has alleged that Walmart's conduct was willful and wanton. But the Illinois Supreme Court has held that even injuries that were the result of willful and wanton misconduct are subject to the Workers' Compensation Act.[5] It seems likely that the complaint against Walmart will be met with a motion to dismiss.

In some states, the standard is lower. For example, in Texas, the family of a deceased employee can recover exemplary damages from the employer based on the employer's gross negligence, which means an act or omission that "involves an extreme degree of risk." [6]

Where the standard is gross negligence, workers' families may be able to prevail by showing that employers failed to take necessary steps to protect employees from the virus. It remains to be seen what type of conduct would be found to be grossly negligent:

- Failing to close a nonessential business;
- Reopening a workplace without satisfying Centers for Disease Control and Prevention, Occupational Safety and Health Administration and other governmental guidelines;
- Failing to monitor the health of employees before permitting them to enter the workplace;
- Failing to provide personal protective gear or adequate hand-washing facilities;
- Insufficient cleaning or sterilization of workplace facilities; or
- Failing to make necessary workplace modifications to allow for social distancing between employees or between employees and customers?

While much remains unanswered, employers should stay abreast of the constantly updated CDC and OSHA guidelines that apply to them, including industry-specific guidelines. It seems that employees and their families will have a difficult time establishing any standard in excess of negligence if they follow applicable guidelines.

## Other Lawsuits

Employees and gig workers at Walmart, Amazon.com Inc., Instacart and Target Corp. who have suddenly become essential, staged a sickout on May Day by striking and asking customers to boycott the stores to protest unsafe working conditions in support of their demands for more personal protective equipment, professional cleaning services and hazard pay from their employers.

Others, including nurses and a former Amazon employee have protested the terminations and other retaliation for speaking out publicly about unsafe working conditions. These movements signal that additional lawsuits outside of the workers' compensation system, including retaliation and whistleblower cases are on the horizon.

## Liability Protection for Businesses

As several states begin reopening and the federal government pushes to reopen as quickly as possible,

companies are fearful of personal injury lawsuits based on COVID-19 infection from employees as well as customers or patrons.

The U.S. Chamber of Commerce has warned that "the threat of exposure-related lawsuits also will deter some businesses from reopening even after it is determined that they could safely operate by following the guidance of appropriate health authorities." The organization has suggested that the federal government should provide businesses with some type of immunity from such suits.

Senate Majority Leader Mitch McConnell, R-Ky., agrees with the Chamber of Commerce, warning of a "lawsuit pandemic." McConnell has stated that any further federal coronavirus relief legislation will include liability protections for businesses, providing them with some type of legal immunity against lawsuits related to COVID-19.

At least one state lawmaker agrees that businesses should have some immunity from coronavirus-related lawsuits. In Florida, state Sen. Jeff Brandes is working on legislation that would prohibit lawsuits against companies that took all necessary precautions to protect their employees and customers. It would not, however, protect businesses whose conduct amounted to gross negligence.

On April 28, President Donald Trump issued an executive order designed to ensure that meat and poultry processing facilities remain open. It was widely reported that the order would shield the meat companies from liability, but in fact, the executive order is silent on the subject.

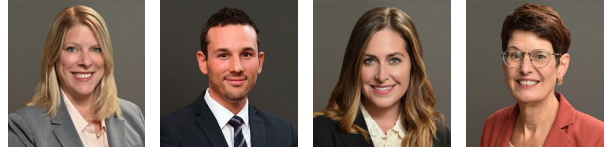
## What Employers Can Do to Protect Themselves

Employers can take steps to limit their liability for causing coronavirus transmission to employees — who may be limited to workers' compensation as their exclusive remedy — as well as to customers, who can sue for damages. Employers should promptly notify employees of suspected or confirmed workplace exposures, while protecting the privacy of sick employees by not revealing their identities.

Other steps that employers can take to protect their employees and reduce their liability include advising symptomatic employees to stay home, conducting health screenings of employees before they enter the workplace, providing appropriate personal protective

equipment, frequently and thoroughly sanitizing workplaces, blocking off common areas, and possibly staggering shifts to minimize the number of workers in the workplace at the same time.

Employers should document all of these practices, including the dates on which they were implemented. Most importantly, employers should comply with all applicable guidelines from the CDC, OSHA, and states and cities as well as any industry-specific guidelines.



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[1] *Issayou v. Issayuou Inc.*, 174 A.D.3d 1277, 1277–78 (3d Dep’t. 2019), leave to appeal denied, 34 N.Y.3d 909 (2020).

[2] See, e.g., *Matter of Nassau County Police Dept.*, WCB #G0337646 (Mar. 26, 2014); *Matter of Long Island Jewish Medical*, WCB #20304530 (Nov. 6, 2006).

[3] *Acevedo v. Consolidated Edison Co. of N.Y., Inc.*, 596 N.Y.S. 2d 68, 70–71 (First Dep’t 1993).

[4] *Garcia v. Recycling Serv., Inc.*, 2013 IL App (1st) 121902-U, ¶ 18, 2013 WL 3325067 (Ill. App. Ct. June 26, 2013).

[5] *Lannom v. Kosco*, 634 N.E.2d 1097, 1100–01 (1994).

[6] Tex. Labor Code Ann. § 408.001 and Tex. Civ. Prac. & Rem. Code Ann. § 41.001.