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## **EMPLOYER NEWSLETTER**

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### **GO TO WORK, NOT TO COURT: AVOIDING COVID-19 RELATED HEALTH AND SAFETY LAWSUITS**

As businesses re-open, politicians and legal commentators have predicted an “explosion” of employee lawsuits related to the COVID-19 pandemic.<sup>1</sup> Employers worry that employees will bring tort claims alleging that they suffered COVID-19 related illness, permanent injury, or death because of unsafe workplaces or improper practices.

The potential theories of liability against employers include: (1) failure to properly screen employees for COVID-19; (2) failure to protect employees from other symptomatic (or asymptomatic) persons; (3) failure to cleanse and sanitize the workspace; (4) failure to provide personal protective equipment; (5) failure to implement a social distancing policy; (6) failure to implement a telework or work-from-home policy; and/or (7) failure to implement various government guidelines.

Fortunately, workers compensation laws<sup>2</sup> are expected to block most employee<sup>3</sup> claims for monetary damages – assuming that courts and state workers compensation agencies consider COVID-19 to be an “occupational disease or injury.”<sup>4</sup>

However, employers should not assume that state workers compensation laws are bullet-proof. The protections afforded by worker’s compensation laws can be disregarded if an employer engages in conduct, or adopts a practice, that is intentionally harmful or deceptive.<sup>5</sup>

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<sup>1</sup> <https://www.washingtonpost.com/us-policy/2020/05/03/congress-coronavirus-legal-liability>

<sup>2</sup> Workers compensation is a state-regulated insurance system that provides compensation to workers who suffer injuries in the course of employment without regard to fault. Workers compensation claims and cases are decided by state administrative agencies, not by judges or juries.

<sup>3</sup> State workers compensation laws may not apply to independent contractors, and they do not apply to third parties who may enter the workplace (*e.g.*, consultants, vendors, sales representatives, clients, customers, etc.).

<sup>4</sup> For example, California Governor Gavin Newsom recently enacted sweeping changes to the state’s workers compensation laws. Now, most California workers who contract COVID-19 are presumed to have a workplace injury covered by the workers compensation system. <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-62-20-text.pdf>

## **BEST PRACTICES:**

Thus, the best way to prevent and defend such claims is to follow federal and state recommendations, mandates, guidelines, and regulations regarding employee safety.<sup>6</sup>

- Consider screening employees for COVID-19;<sup>7</sup>
- Protect employees from other symptomatic (or asymptomatic) persons;
- Cleanse and sanitize the workspace consistently and thoroughly;<sup>8</sup>
- Provide workplace-appropriate personal protective equipment (“PPE”);<sup>9</sup>
- Implement social distancing policies and practices (*e.g.*, staggered shifts breaks, lunch periods; locking restroom doors, toilet seat protectors, sanitizers, etc.);
- Cancel non-essential in-person meetings and travel;
- Allow telework when feasible;
- Consider reconfiguring work spaces;<sup>10</sup>

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<sup>5</sup> For example, a group of nurses sued a temporary staffing agency for allegedly misleading nurses to work in unsafe environments and in providing negligent care. *Allen v. Krucial Staffing, LLC*, No. 20-cv-2859 (S.D.N.Y. Apr. 6, 2020).

<sup>6</sup> The Occupational Safety and Health Administration (“OSHA”) has posted recommendations and guidance relating to the COVID-19 health crisis. See (1) OSHA’s Personal Protective Equipment (PPE) standards; <https://www.osha.gov/SLTC/covid-19/standards.html>; (2) the General Duty Clause, requiring employers to furnish “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” <https://www.osha.gov/Publications/OSHA3990.pdf>; and (3) the Recordkeeping and Reporting Occupational Injuries and Illness Requirement <https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>.

<sup>7</sup> Currently, taking temperatures is not required in most Arizona workplaces. The CDC recommends screens to detect temperatures of more than 100.4 degrees Fahrenheit. If you decide to screen employees, you should also check the temperatures of guests, clients, vendors, and contractors to ensure a safe work environment. Remember, these medical exams must be conducted in a confidential way and the results must be maintained in a separate medical file.

<sup>8</sup> The CDC just released cleaning guidelines for public spaces. [https://www.cdc.gov/coronavirus/2019-ncov/community/pdf/ReOpening\\_America\\_Cleaning\\_Disinfection\\_Decision\\_Tool.pdf](https://www.cdc.gov/coronavirus/2019-ncov/community/pdf/ReOpening_America_Cleaning_Disinfection_Decision_Tool.pdf)

<sup>9</sup> If the employer requires face masks or latex gloves, it should pay for them. In Arizona, face masks are recommended but not required.

<sup>10</sup> Possible examples include:

- Erect partitions between receptionists and others that may directly interact with the public or coworkers;
- Separate employees who work in adjacent cubicle spaces;
- Remove every other chair in break areas and lunchrooms;
- Add partitions to tables where employees congregate during breaks;
- Designate one-way walking lanes in heavily trafficked hallways or narrow corridors;
- Consult with landlords about converting communal restrooms to single-seat bathrooms to avoid close contact between users;
- Make sure HVAC air filters are changed frequently;

- Space-out seating (more than 6 feet apart);
- Restrict use of shared spaces and equipment;
- Adopt an action plan if an employee gets COVID-19;<sup>11</sup>
- Train all staff regarding safety measures;<sup>12</sup> and
- Take seriously employee health/safety concerns.<sup>13</sup>

### **Conclusion**

Assuming COVID-19 is considered a covered occupational disease, most employers will be able to rely on workers' compensation statutes to avoid direct liability to employees for monetary damages.

Nevertheless, employers should adopt policies and implement best practices now to protect their employees and minimize their potential liability. An employer's best defense to a potential employee lawsuit alleging COVID-19 exposure or harm is to show that it exercised reasonable care by adopting risk-mitigation measures that comply with OSHA, the CDC and state or local guidelines.

If we can help you adopt policies and best practices, please contact Mr. Clark: email: [etc@clarkfirm.com](mailto:etc@clarkfirm.com) or 480-844-0039.

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- Provide hand sanitizer stations outside each restroom and each door that is commonly touched or used;
  - Upgrade teleconference equipment or subscriptions to allow for more teleconferences; and
  - If possible, arrange for outdoor pick-up and drop-off delivery of packages.

<sup>11</sup> If an employee's COVID-19 case is confirmed, CDC recommends that an employer notify all employees who work near the affected employee. To the extent possible, do not reveal any confidential medical information such as the employee's name unless the employee has signed an authorization to disclose their diagnosis. The failure to notify employees at the location of a confirmed case may be a violation of OSHA's general duty clause, which requires all employers to provide employees with a safe work environment.

<sup>12</sup> The more employees understand about what and why safety measures are being taken, the more likely they will "buy-in." Training and dialogue will prevent complaints to OSHA or other government agencies or prevent employees from seeking legal representation about perceived workplace risks.

<sup>13</sup> Employee complaints about perceived safety issues should be taken seriously and investigated; do not take any retaliatory action against employees who make such claims in good faith.