



# Mitigating COVID-19 Personal Injury Risks

October 2020

As the summer ends and fall begins, many companies are looking to make a full return to business. With that return come questions about potential liabilities and insurance ramifications stemming from COVID-19. In this article, USI will address the increased exposure to personal injury claims. Personal injury claims involve allegations of physical injury inflicted to a person's body. Many personal injury claims are covered under Workers' Compensation insurance, Employer's Liability insurance, and General Liability insurance.

## Workers' Compensation

### Presumption

Generally, Workers' Compensation insurance provides coverage to employers for personal injuries sustained by employees that are work-related. Workers' Compensation traditionally has not covered an employee's contraction of communicable diseases like a cold or flu because they typically cannot be directly tied to the workplace. However, there may be exceptions depending on how and where a disease like COVID-19 is contracted. Considerations are given based on whether the claim "arises out of and in the course of employment" or when an employer may place an employee at an "increased risk" of contracting COVID-19.

Currently, many states have responded to COVID-19 by amending [state policy](#) so that COVID-19 infections in certain workers and industries are presumed to be work-related and covered under Workers' Compensation. This presumption places the burden on the employer and insurer to prove that the infection was not work-related, making it easier for the employee to file a successful claim.

To manage the new exposures, many employers are working with their claim administrators to develop policies and procedures for proper investigation and handling of presumed COVID-19 claims. Some of these policies and procedures include medical health apps, employee screening, and record retention.

### Remote Employees

Allowing employees to work remotely from home certainly increases Workers' Compensation risk for employers, since

the employer has very limited or no control over the home environment of their workers. A major question that arises when a remote worker is hurt is whether the injury took place within the course and scope of employment. For Workers' Compensation insurance benefits to apply, the injury must have occurred during work hours and from an activity related to work.

## Employer's Liability

In some cases, employees can recover a payout from an employer outside the exclusive remedy of Workers' Compensation. In most states, the ability to recover outside of Workers' Compensation requires proof that the injury was caused by employer actions that were either intentional or willful and wanton or grossly negligent. In this case, most employers will have some level of coverage under Employer's Liability insurance.

COVID-19 clearly creates an increased exposure to these types of claims for employers. An employer's failure to adhere to known and established COVID-19 safety protocols could be interpreted as intentional, willful and wanton or grossly negligent. Were that the case, an employee's claim would not be controlled by state Workers' Compensation statutes. Family member claims for loss of care and services and for consequential bodily injury are also increased with the exposure of COVID-19. Many families are now required to provide daycare services to family members and the loss of these services due to a COVID-19 diagnosis could be part of a claim. In addition, employees who contract COVID-19 at work may expose family members to the virus creating consequential damages such as healthcare costs, time off from work, and personal injury.

## Mitigating Employment Practices Liability

In implementing employment- and workforce-related policies and procedures, organizations must be mindful of compliance with federal and state laws which protect employee rights. The U.S. Equal Employment Opportunity Commission (EEOC) has created a separate webpage for employers to guide them with regard to COVID-19 and the Americans with Disabilities Act, The Rehabilitation Act and

other EEO laws. See link to the web page here:

<https://www.eeoc.gov/coronavirus>.

Many states have also adopted their own employee protection laws and organizations should consider consulting with counsel to ensure compliance when implementing new policies and procedures as part of their risk mitigation.

## General Liability

To date, COVID-19 personal injury claims have involved allegations of failure to develop and implement infection control and prevention procedures, causing plaintiffs to contract COVID-19. An interesting selection of personal injury claims encompass marine cases involving cruise ship passengers and allegations of the cruise lines' failure to properly screen passengers, disinfect ships, require employees to wear masks, and enforce social distancing. The greatest difficulty claimants will have in maintaining a personal injury claim is proving that they contracted COVID-19 at or from a business. For this reason, most litigation is focused on the failure to adhere to established safety standards as creating a presumption of causation.

A General Liability policy will cover a company's legal liability for bodily injury (personal injury) arising out of an accident occurring during the policy period. However, possible exclusions to coverage include: (1) expected or intended injuries that a reasonable person would or should have expected; (2) pollution; and (3) a specific virus exclusion. Based on the coverage definition of an accident and the exclusions, it's important that companies complete a full examination of their current practices regarding how they interact with third parties (including clients, customers and vendors), both in terms of their premises, as well as their direct contact with employees. **A third party having direct contact with your organization can allege they contracted COVID-19 because of your actions. Taking the appropriate steps to protect your company can make all the difference in defending a claim.**

## Risk Control: Steps to Take

While companies may not be able to eliminate the exposure of personal injury from COVID-19, they should take specific precautions and actions to limit their liability and possibly reduce damages. Companies should safeguard against these nine primary allegations:

1. Failure to screen employees for COVID-19 before and after work. This could range from simple signage with instruction on how to "prevent the spread" to having a policy that requires employees to self-assess their risk

level and remove themselves from the work environment when an elevated risk is identified. More stringent use of daily rapid tests, as well as any combination and timing of screening (as technology and testing availability allow), are also worth consideration.

2. Failure to protect employees from others. This assumes there could be symptomatic or asymptomatic individuals in the workplace and may include taking steps to address employee communications and training, physical distancing and/or separation, workplace capacity, work-from-home alternatives, accommodations for high-risk individuals, sanitation, hand washing and decontamination, Personal Protective Equipment (PPE), ventilation, etc.
3. Failure to protect employees' family members. The protective measures outlined here are collectively intended to prevent the transmission of the virus in the workplace and the passage of the virus from the workplace to the employees' family, friends, and acquaintances.
4. Failure to clean and sanitize work locations. Sanitation may include policies and procedures to minimize or eliminate the presence of the virus in the workplace. This could include frequent and periodic decontamination of surfaces, filtering of the air, increasing exhaust and fresh air intake, shut down and deep cleaning/sanitization before reopening and after known exposure from an infected individual.
5. Failure to provide appropriate and adequate PPE. While PPE is our last line of defense against the virus, it plays a vital role in preventing the spread of COVID-19. Since the virus is spread through respiratory droplets produced when an infected person coughs, sneezes or talks, everyone should cover their mouth and nose with a mask or appropriate face covering when in public settings and when around people who don't live in their household, especially when other social distancing measures are difficult to maintain.
6. Failure to implement social distancing, including location capacities. Social or physical distancing is an administrative control that protects individuals through distance from potentially infected individuals who could be spreading virus via respiratory droplets. The more distance we maintain, the more diluted and limited our exposure.
7. Failure to provide and support work-from-home alternatives. Isolation is the best way to avoid exposure. Working from home eliminates the exposure among employees by eliminating the possible airborne spread of virus from source to source.

8. Failure to isolate. Isolation means keeping someone who is infected or potentially infected with the virus away from others, thereby eliminating the possible airborne spread of virus from source to source. This includes having policies and procedures in place that would immediately isolate infected or potentially infected individuals who have entered the workplace, as well as individuals who have a known, demonstrated or suspected change of infectious status while in the workplace.
9. Failure to follow state guidelines and laws and those of the Centers for Disease Control & Prevention (CDC) and the Occupational Health and Safety Administration (OHSA). Some states have begun developing laws to address prevention and control of COVID-19. These laws are very specific and demand compliance. Additionally, while federal, state, and even local guidelines are advisory in nature, they would likely be characterized as “best practices” in a legal dispute and may be introduced as a minimum standard of care or industry practice. For these reasons, awareness and compliance of these laws and guidelines are essential to both prevention and legal defense.

To date, three key cases have been brought in these areas. Walmart was sued for a failure to warn and isolate, Tyson was sued for a failure to warn, and Riverside Community Hospital was sued for a failure to provide adequate PPE to employees. The failure to adhere to known and established industry standards and regulations creates a very significant exposure that can lead to nuclear verdicts.

USI's STEER (Steer Through Epidemic & Economic Recovery) resources provide content and tools to assist our clients in proactively preparing and addressing each of these nine primary allegations.

## Immunity

Currently, over a dozen states have enacted legislation limiting COVID-19-related civil liability for a broad range of businesses. About a dozen other states have legislation pending that, if enacted, would provide varying degrees of civil immunity. In addition, most states have imposed some limitations on COVID-19-related liability for healthcare providers, manufacturers and suppliers of PPE or other supplies, and/or volunteers as a result of executive orders, proclamations or emergency declarations.

However, these civil immunity laws vary widely from state to state. Key differences include who qualifies for immunity, what acts or omissions are protected, and how long the immunity lasts. Nearly every state law preserves liability for certain types of extreme or intentional conduct, most commonly for willfulness, recklessness and gross negligence. However, the precise scope of each immunity exception varies by state. For these reasons, the best practice still requires taking the necessary steps to mitigate liability.

## Waivers

Some companies are using waivers to try and limit COVID-19 exposure. As to Workers' Compensation, it is often the case that an employee cannot waive benefits provided under the Workers' Compensation statute. For waivers applying to third parties, most states require that a waiver involve the intentional relinquishment of a known right, rather than a simple generic notice or response. As of this writing, there remain many more questions than answers with regard to waivers, specifically whether they are an effective means of limiting a business' COVID-19 exposure.

## Helpful Resources

To help clients navigate these challenging times USI has implemented a **STEER (Steer Through Epidemic & Economic Recovery) Task Force**. This cross-functional team is working to provide timely COVID-19 information, understand cross-industry and geography impact and evolving responses, and to develop and deliver tailored solutions to help clients **steer** through this epidemic challenge and economic recovery.

For additional resources, tools, information, and links, please visit our COVID-19 resource page: [www.usi.com/public-health-emergencies](http://www.usi.com/public-health-emergencies)



This publication and the information contains proprietary information of USI Insurance Services, LLC. Recipient agrees not to copy, reproduce or distribute this publication, in whole or in part, without the written consent of USI Insurance Services. The contents of this publication are for information purposes only and are not intended to be exhaustive nor should any discussions or opinions be construed as legal advice. Contact your broker for insurance advice, tax professional for tax advice, or legal counsel for legal advice regarding your particular facts or issues. USI Insurance Services assumes no liability for consequences of any actions taken on the basis of the information provided herein. ©2020 USI Insurance Services. All Rights Reserved.