

How To Avoid Wrongful Death And Injury Claims For Workplace COVID-19 Exposure

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Employers are starting to be served with wrongful death and personal injury lawsuits alleging an employee's exposure to COVID-19 at work should lead to employer liability, despite the general rule that the workers' compensation system is the exclusive remedy for such claims. Plaintiffs' attorneys are ignoring or bypassing such statutes to achieve higher and quicker payouts for their clients. As these claims begin to reach the news, you can be sure that an increasing number of lawsuits will be filed in the coming days, weeks, and months. You should take action now to avoid such claims from ever being filed – and to put yourself in the best position to defend such claims should you receive one.

Why Are Lawsuits Being Filed?

Workers' compensation insurance generally covers injuries or illnesses that are caused "unintentionally" by an accident or exposure in the work environment. However, because the damages recovered in a workers' compensation claim are generally capped by statute, plaintiffs' lawyers may ignore the statutory workers' compensation system. They may instead file a lawsuit in court claiming intent or willfulness, as they recognize that the potential recovery may be much higher. In some states, the worker may file both a workers' compensation claim and a lawsuit.

In addition to the chance for a higher payout, other reasons you may see a lawsuit instead of just a workers' compensation claim include:

- **Publicity.** Some attorneys may take advantage of the current media coverage directed towards COVID-19-related

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workplace deaths and injuries and file the lawsuit to appear in the public limelight. Workers' compensation claims are not as alluring as a complaint publicly filed in state or federal court demanding a jury trial.

- **Right To Jury Trial.** Workers' compensation claims are generally heard by a hearing officer or administrative law judge during a "bench trial," with no jury present. In a wrongful death or personal injury claim, the family of a deceased worker or an injured worker themselves could have a jury of their peers evaluate the evidence and decide, in most cases, the amount recovered. Juries tend to award higher amounts the judges presiding over bench trial.
- **Access To Additional Funds And Early Settlement.** Lawyers may file lawsuits in lieu of, or in addition to, workers' compensation claims, to gain access to other funds, like general liability insurance policies. To avoid the publicity and costs of protracted litigation, defendants may settle these claims quickly, giving the family or worker a quick payout rather than enduring the lengthy workers' compensation process.

Ways To Avoid Such Lawsuits

The best way to defend a wrongful death or personal injury lawsuit is to prevent it from ever occurring. Workplace safety has never been more important, and employers should continue to take steps to avoid employee exposure to COVID-19. Some prudent workplace safety practices for employers concerning the coronavirus include:

1. Follow the CDC's Interim Guidance for Businesses, including best practices for social distancing, Guidelines for Cleaning and Disinfecting the workplace, and quarantining employees who have an exposure to a confirmed COVID-19 case, found at the CDC's Public Health Recommendations for Community Exposure. Send employees with confirmed cases home until released by a medical professional or until they meet the guidelines for discontinuing self-isolation.
2. If you are an essential business employing critical workers, the CDC has adopted different guidelines to follow, including allowing asymptomatic employees who have had a direct COVID-19 exposure to continue to work as long as certain guidelines are met.
3. Educate your employees and engage with them. Constantly remind employees of the symptoms of COVID-19 and urge them to seek medical attention if symptoms appear. Check in with isolated sick employees at least once a day to ask about their health. An employee with whom you engage will be less likely to seek litigation against their employer. An employee's family will also appreciate this courtesy. If a COVID-19 death does occur, reach out to and embrace the family, extend genuine heartfelt condolences, and ensure the funeral is paid for.



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4. Inform employees of confirmed cases of COVID-19 in the workplace. The CDC recommends that employers notify potentially exposed co-workers of confirmed cases. Err on the side of transparency. Although no case law currently exists, we believe the Occupational Safety and Health Administration may ultimately determine that a failure to notify employees of a confirmed COVID-19 case is a violation of OSHA's general duty clause, the agency's generic requirement to maintain a safe work environment.

What To Do If A Lawsuit Is Filed

Even if you take the steps above, your company may still face a wrongful death or personal injury lawsuit. Take immediate steps to defend the claim, including the following:

1. Notify counsel and all insurers who may provide coverage for such a claim, including your general liability, workers' compensation, and premises liability insurers.
2. Determine with the advice of counsel if early dismissal of the lawsuit is possible. A workers' compensation exclusive remedy statute may in fact apply, resulting in a quick resolution to the lawsuit, leaving only a worker's compensation claim.
3. If the lawsuit proceeds, prepare witnesses and gather documents to demonstrate the company's COVID-19 response plan and measures, representing your commitment to employee safety during the pandemic. You may also have the lawsuit dismissed if you can show that, given your safety practices, it was nearly impossible for the disease to be contracted at work or due to the company's actions or omissions.

Conclusion

This is a constantly evolving area, with new guidance being issued nearly every day. These lawsuits will continue to be filed and you should act today in case you are served with such a complaint tomorrow. If you receive a demand letter or lawsuit regarding a claim concerning an employee allegedly contracting COVID-19 at work, seek the advice of counsel to respond appropriately.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, or any member of our COVID-19 Taskforce. You can also review our nationwide Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus and our FP Resource Center For Employers, maintained by our Taskforce.



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This Legal Alert provides an overview of a developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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