

COVID-19 infections and employer liability

Employer questions and considerations

April 28, 2020

Potential liability risks

Employees

Non-employees

- Independent contractors
- Customers
- Visitors to worksite
- Family members or friends of employees

Theories of liability

Employment law violations

Workers' compensation

Tort law

Employment law violations

- ADA – Failure to accommodate, disability discrimination, failure to maintain confidentiality, improper inquiries
- OSHA – “general duty” clause – must furnish a place of employment that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”
- Wage and Hour – overtime, minimum wage
- Leave Laws – FFCRA, FMLA, state paid sick leave
- Retaliation – adverse action after “protected activity”

Workers' compensation: Overview

- **State law** regime
- Covers occupational **injuries** and **diseases**
- Does not require an employee to prove **fault**
- Employer may buy insurance **or** self-insure, depending on state law
- Covers virtually all private employers
- Covers virtually all employees

Who is **not** covered?

- Independent contractors
- Volunteers
- Customers
- Visitors
- Classes of employees carved out by state law, e.g., agricultural employees

Workers' compensation: Disease coverage

- Must show **causation** – disease contracted at work
- Additionally, disease is typically not covered unless the disease is **peculiar to the occupation** in which the employee is engaged
 - Is the risk of contracting the disease **greater** in this occupation than in others?
- Does the state statute list covered diseases?

Workers' compensation: Liability

- Medical benefits – treatment necessary for injury, vocational rehabilitation
- Disability benefits – loss of earnings or earning capacity, calculated based on normal pay, usually subject to maximum and minimum amounts
- Death benefits – calculated based on fixed percentages or proportions of wages
- Key question: Is employer self-insured?

Workers' compensation: Exclusive remedy

- Workers' compensation: a “grand bargain.”
- Employees get streamlined claims, no need to show fault.
- Employers get **immunity from civil actions for occupational injuries and diseases**

That means:

- No jury trial
- No punitive damages
- Less publicity

Possible Exceptions:

- Noncompliance with workers' compensation law
- Intentional / willful misconduct
- “Normal” employment causes of action (e.g., harassment claims)
- Noncompensability

Workers' compensation: Application to COVID-19

- COVID-19 is a potential **occupational disease**
- Under traditional workers' compensation laws, may **not** be covered
 - **Causation:** How can the employee prove it was contracted at work?
 - **Nature of job:** For non-medical jobs, how is the risk of contracting peculiar to the nature of the occupation?

Workers' compensation: State actions

- Illinois Workers' Compensation Commission Emergency Amendment [**UPDATE: This rule has been withdrawn and is presently not in effect**]
 - Effective Apr. 16, 2020, expires 150 days later
 - If a “Front-Line Worker” or first responder has an injury or period of incapacity resulting from exposure to COVID-19 “during a COVID-19-related state of emergency,” there is a rebuttable presumption that such exposure arose “out of and in the course of” employment and was “causally connected to the hazards or exposures of . . . employment.”
 - “Front-Line Worker” is defined broadly to include those working for essential businesses including, *inter alia*, workers in food and beverage production and agriculture
 - [Illinois Register Workers' Compensation Commission Notice Of Emergency Amendments](#)
 - See also [Illinois' Executive Order in Response to Covid-19 \(Covid-19 Executive Order No. 8\)](#) for definition of essential businesses
- Emergency Amendment controversial and subject to challenge
- Other states expanding workers' compensation laws: Kentucky (includes grocery store workers and child care workers, among others)
- NCSL Summary: <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx>

Tort actions

- Governed by state law
- Must show **causation** – more difficult to do as third party plaintiff is one step removed from employee on causal chain
 - However, plaintiffs may argue that they were in compliance with “stay at home” order and, as a result, there were few other exposure vectors
 - Ultimately a fact issue that will vary from case to case
- Must show that employer owes duty of care to third party
 - Was it reasonably foreseeable to employer that third party plaintiff could contract illness from exposure to illness contracted by employees
 - Courts are split on this issue

Key factors in determining duty of care in tort actions

- Factors courts and juries consider in determining when defendant has complied with duty of care
 - Government recommendations/standards, e.g., CDC, OSHA, state or local “stay at home” or “shutdown” orders
 - Industry practices/standards
 - But compliance with government and industry standards is not a complete defense
 - Companies may be required to go beyond government and industry standards
 - Government and industry standards may be considered the floor, not the ceiling
 - Independent health expert

Practical considerations in proving due care compliance

- Expert testimony
- Consider documenting changes in corporate practices and justification for change
 - E.g., document change in government directives/standards
 - Focus on facts, not opinions
 - In absence of documentation, it may be difficult to recall policies on a particular date or justification for any change
- Document change in community outbreak if that modifies practices

Discussion of *Evans v. Walmart*

Defendants:

- Walmart
- JM2 Evergreen – shopping center owner

Cause of Action:

- Negligence

Allegations:

- Evans and others contracted COVID-19 from Walmart store
- Evans died as a result of workplace COVID-19 infection
- Another Walmart employee from the same store died from a COVID-19 infection
- Walmart failed to exercise reasonable care in keeping employees safe

Discussion of *Evans v. Walmart*: Specific allegations

- Lack of cleaning/sterilizing
- Failure to enforce social distancing
- Failure to provide PPE
- Failure to warn of potential COVID-19 infections in store
- Failure to follow CDC/OSHA guidelines

Discussion of *Evans v. Walmart*: Liability issues

- Does Walmart have workers' compensation exclusivity defense?
 - Illinois Emergency Amendment?
 - *Folta v. Ferro Eng'g*, 43 N.E.3d 108, 113 (Ill. 2015): “[A]n employee can escape the exclusivity provisions of the Act if the employee establishes that the injury (1) was not accidental; (2) did not arise from his employment; (3) was not received during the course of employment; or (4) was not compensable under the Act.”
- What about JM2 Evergreen?
- If a tort claim, how will plaintiff show causation?

Discussion of *RCWA v. Smithfield*

Defendants:

- Smithfield Foods, Inc.
- Smithfield Fresh Meats Corp.

Causes of Action:

- Public Nuisance and Declaratory Judgment
- “Breach of Duty to Provide a Safe Workplace” and Declaratory Judgment

Allegations:

- Focused on Smithfield plant in Milan, Missouri (but allegations reference conduct across the country).
- Smithfield does not comply with CDC and other public health official guidelines
- Smithfield employees have contracted COVID-19 and died

Discussion of *RCWA v. Smithfield*: Specific allegations

- Insufficient PPE / face coverings
- Lack of social distancing or efforts were insufficient (e.g., plexiglass dividers were too short, not enough break time to use hand cleaning stations)
- Employees must take breaks at the same time
- Discourages taking sick leave (including offering incentive pay for no leave usage)
- Ignoring letter from group of workers requesting help
- Going to the media: April 24, 2020 Washington Post Op-Ed by an anonymous Smithfield worker: “In my lawsuit, I’m bringing to light what I’ve experienced, and I hope to force Smithfield to change the way they’re treating us — anonymously, because I’m scared that they’ll come after me if they know who I am.”

Discussion of *RCWA v. Smithfield*: What's going on?

- Why a lawsuit seeking no damages?
- The Rural Community Workers Alliance (RCWA) is a union that is “organizing meatpacking plant workers in rural Missouri.”
 - Reports are that the Smithfield plant is not currently unionized.
- Lawsuit filed Apr. 23, 2020, with emergency motion filed for preliminary injunction or temporary restraining order. Hearing set for April 30, 2020.

When do you take care?

- Before workers get to the worksite
- At the worksite
- Responding to infections and suspected infections

Duty of care: Before workers enter the worksite

Telework

Screening

Monitoring

Sick
persons
stay out of
workplace

Leave
policies

Duty of care: At the worksite

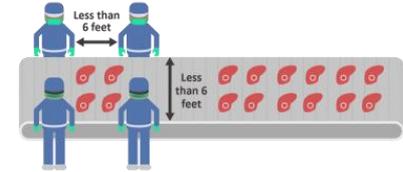
- Hygiene and respiratory etiquette; breaks for washing hands frequently
- Cleaning – EPA approved cleaning chemicals
- Flexible hours, e.g., staggered shifts
- Social distancing
- Limiting duration/frequency of activities where distancing is impossible
- No/limited meetings
- Face coverings/masks
- PPE
- Don't share tools/equipment
- Training
- Physical barriers, repositioning workstations

Watch for industry-specific guidance

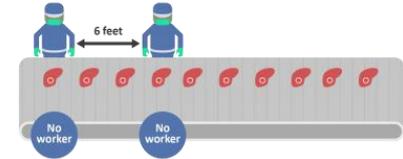
- [OSHA](#) and [CDC](#) are issuing industry-specific guidance
- Apr. 26 guidance for Meat and Poultry Processors
 - Specific guidance on social distancing
 - Creating a COVID-19 assessment and control plan
 - Cloth face coverings
- Other industry-specific guidance includes: healthcare, grocery and food, construction, manufacturing, and retail.

How to Align Meatpacking and Meat Processing Workstations, If Feasible

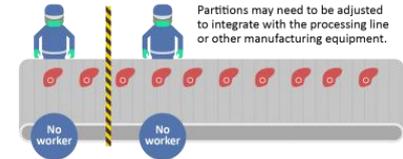
Bad:
Workers are within six feet of one another, including at side-by-side or facing workstations.



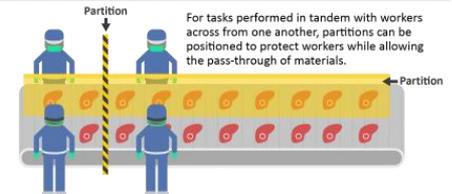
Good:
Workers are spaced at least six feet apart, not facing one another. Other configurations may be used to achieve similar distancing between workers.



Good:
Physical barriers, such as partitions, separate workers from each other.



Good:
Physical barriers, such as partitions, separate workers from each other, including where workers need to perform tasks in tandem across from one another.



Duty of care: Responding to infections

Send the employee home

Investigate

Inform

Take prompt action to keep
the workplace safe

What if a lawsuit is filed?

Issue a litigation
hold

Notify all relevant
insurance carriers

Consider early
dismissal via
workers'
compensation
exclusivity

Develop Strong
Initial Response

Reopening workplaces and expanding operations

- Follow federal, state, and local law/guidance
- Speed of ramp-up to “normal” in-person operations
- Continued telework
- Training of employees and supervisors
- Staying prepared for infections
- “Vulnerable” populations

Questions?

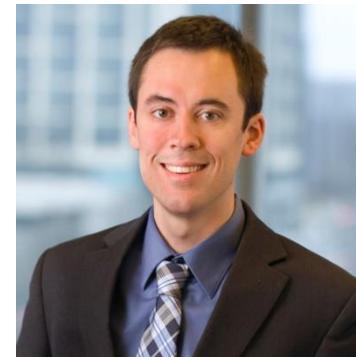
George W. Ingham

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George Ingham represents and counsels clients in a wide range of labor and employment matters. Experienced in deciphering the complex and ever-changing landscape of employment law, he offers sensible guidance that is legally sound, practical, and in line with his clients' goals.

His experience includes advising clients in a range of labor and employment topics, including antidiscrimination, retaliation, non-competition agreements, and wage and hour law. He also advises clients on labor and employment laws applicable to government contractors, such as Executive Order 11246, labor-management relations, and workforce restructurings. When disputes arise, George has successfully represented clients in litigation, arbitration, and administrative proceedings.

Prior to joining the firm, he served as a law clerk to the Honorable Karen LeCraft Henderson of the U.S. Court of Appeals for the District of Columbia Circuit and the Honorable W. Harold Albritton III of the U.S. District Court for the Middle District of Alabama. George is a member of the Virginia and District of Columbia Bars.



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Michael Kidney represents and counsels clients facing a wide range of high-stakes consumer class actions, product liability claims, and liability claims alleging death or serious physical injuries. He has over 25 years of experience winning lawsuits – and counselling clients on how to avoid them in the first place. His practice has a particular focus on the food industry.

As a result of filing early dispositive motions, Michael has won the outright dismissal of dozens of lawsuits – at the very outset of the case. These dismissals have resulted in opinions that have been widely cited. For example, Michael secured the dismissal, with prejudice, of a group of defendants from an MDL proceeding involving a consolidated nationwide class action filed in a plaintiff-friendly jurisdiction and involving over-the-counter pharmaceutical products.

In other cases, Michael has been able to resolve the case early by narrowing the issues in discovery, developing facts that lead to an early resolution, and employing alternative dispute resolution strategies. Michael firmly believes that there are many ways to resolve a case other than by engaging in protracted and expensive discovery.

Prior to joining the firm, he served as a law clerk to the Honorable Deanell Tacha of the U.S. Court of Appeals for the Tenth Circuit. Michael is a member of the District of Columbia bar.



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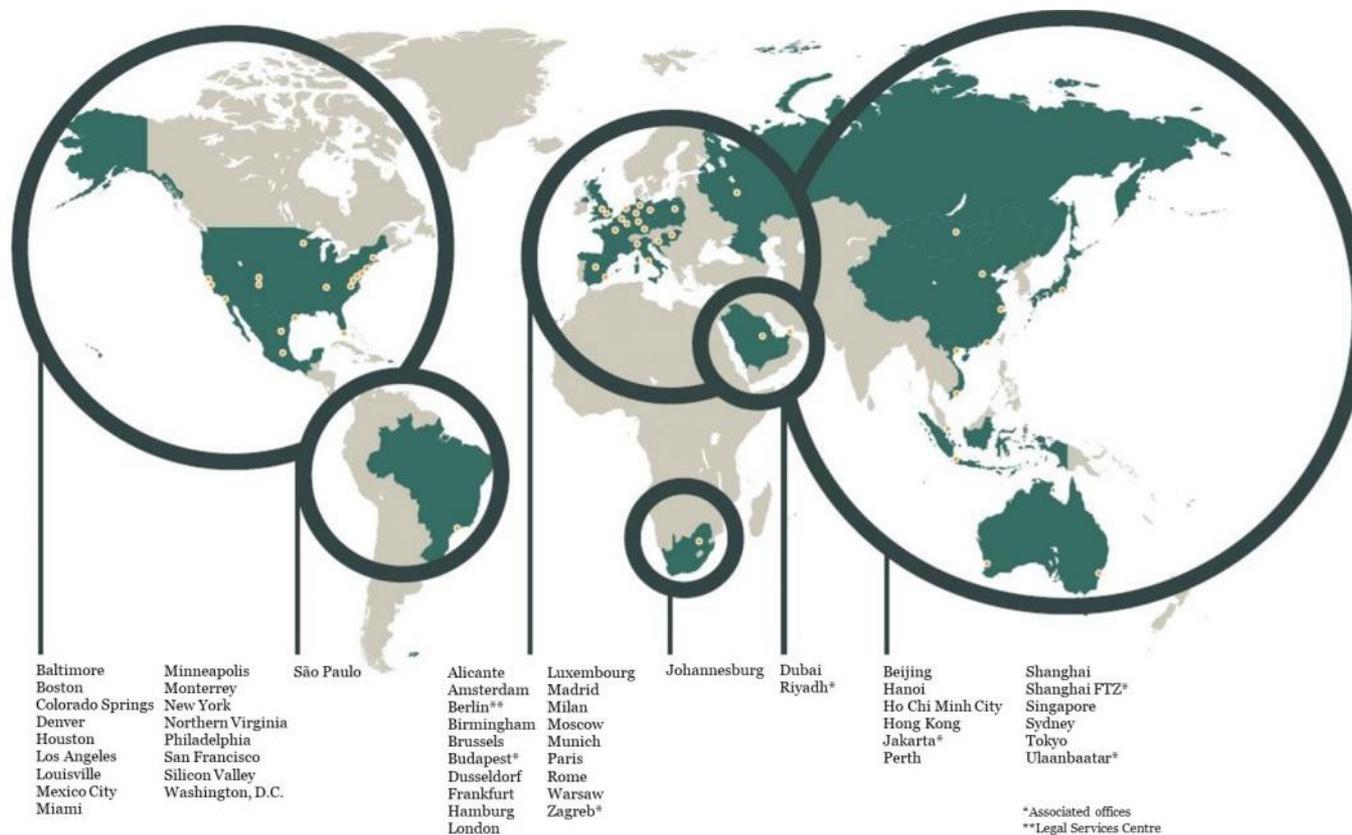
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