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COVID-19 Workplace Exposure: Limiting Employer Liability

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This article addresses some of the issues employers will face when raising a workers' compensation defense to a COVID-19 tort action.

In the midst of the coronavirus pandemic, millions of Americans are still working every day. These essential workers – including first responders, healthcare providers, farm and factory workers, and grocery store, retail and restaurant employees – are exposed to the public (and the virus) as part of their jobs. Employers are striving to protect these front-line employees by enacting novel safety measures to limit their employees' contact with the public and the virus. A good example of a forward thinking safety measure is contactless drop-off policies designed to protect delivery drivers. There are many other examples of employers continuing to operate their businesses while creatively protecting their employees. However, some employers simply cannot eradicate exposure while also performing their critical functions. Because some employers cannot shield their employees from exposure, these employers will likely be subject to litigation regarding alleged workplace exposures to COVID-19.

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WRONGFUL DEATH ACTION

One of the first COVID-19 wrongful death actions against an employer was filed earlier this month in Illinois state court.[1] In that case, the decedent, Mr. Evans, worked at a Walmart Supercenter in Evergreen Park, Illinois, and contracted COVID-19 and died. Mr. Evans' estate claims he died from workplace exposure to the virus and that Wal-Mart knew other employees had exhibited symptoms of COVID-19, but allowed them to work. Plaintiff also alleges Wal-Mart knew that its employees would be exposed to COVID-19 given the volume of customers entering the store. Mr. Evans' estate believes Wal-Mart willfully and wantonly disregarded these known risks to its employees and that because of Wal-Mart's willful misconduct Mr. Evans lost his life.

The story of Mr. Evans – a frontline grocery worker who lost his life to coronavirus – will unfortunately repeat itself over and over again. As we draft this article, U.S. officials have confirmed over one million COVID-19 cases and over 100,000 COVID-related deaths in America. Some of these cases probably involve front-line, essential employees who continued to work while most of the country was sheltering in place. Some essential workers who contract the virus will file personal injury actions against their employers, claiming to have contracted the virus at work. For these employers facing COVID-related personal injury and wrongful death suits, workers' compensations statutes will provide their first line of defense.

EXCLUSIVE REMEDY

Every state has a workers' compensation scheme. Every state also has a provision making workers' compensation the exclusive remedy for workplace injuries. Exclusivity provisions strike the balance between compensating workers for industrial injuries and sparing businesses from ruinous tort litigation. If applicable, workers' compensation exclusivity provisions can rescue employers from long, protracted litigation related to COVID-19 exposures and limit the scope of damages. Because workers' compensation exclusivity provisions often deprive courts of subject matter jurisdiction over tort claims, motions to dismiss will be the order of the day when COVID-19 suits predictably flood our nation's courts.

To prevail on a motion to dismiss based on the exclusivity of workers' compensation, an employer must demonstrate that the employee's alleged injury is covered by workers' compensation and that no exception to the exclusivity provision applies. Whether workers' compensation bars litigation will vary state-by-state and case-by-case depending on the breadth of each state's workers' compensation program and the scope of any exceptions to exclusivity.

WORKPLACE INJURY

One threshold issue will be whether COVID-19 exposures qualify as a workplace injury or occupational disease under a particular state's workers' compensation laws. Some states' workers' compensation schemes apply broadly to any work-related injury. In these states, contraction of COVID-19 will likely count as a work-related injury and any tort suit against an employer would be barred. In other states, though, workplace injuries or occupational diseases are defined more narrowly and exclude injuries and diseases that an employee could have been exposed to outside of her employment. Some of these states specifically exclude "ordinary diseases of life," such as the common cold or flu, from their workers' compensation schemes and these states may treat COVID-19 similarly. In these states, employers will have to litigate on a case-by-case basis whether a COVID-19 exposure qualifies as a workplace injury or occupational disease. These cases will turn, in part, on whether the occupation in question ordinarily requires exposure to communicable disease such as COVID-19.

EXCEPTIONS

Another important issue when raising workers' compensation exclusivity as a bar to litigation is whether any exceptions apply. The intentional tort exception to exclusivity is the most recognized and applied exception. Most states have an intentional tort exception; however, they are divided on what is required to establish the exception. This division generally falls into two camps: (i) states that require employers to actually intend the harm suffered by their employees, and (ii) states that require employers to expose their employees to a condition despite substantial certainty that the condition will result in harm.

Most states apply the actual intent rule, which is virtually impossible to prove because an employee must demonstrate that her employer actually intended the harm that resulted. In actual intent states, the intentional tort exception will almost certainly not apply in the context of COVID-19 exposures. It is simply too far-fetched for an employee to argue that her employer's purpose was to expose the employee to COVID-19.

Eleven states apply some version of the substantial certainty rule: Connecticut, Louisiana, Michigan, New Jersey, North Carolina, Ohio, Oklahoma, South Dakota, Texas, Washington, and West Virginia. This rule generally provides that an employer is liable in tort when there is a substantial certainty that the employee's injury will be the outcome of employer's conduct. In substantial certainty states, employers may be subject to tort liability arising out of COVID-19 exposures on a case-by-case basis. These cases will depend on the nature of the work the employer was asking the employee to perform. For example, a court may

hold that it was a substantial certainty that a nurse would be exposed to COVID-19, but not a substantial certainty that a farm worker would be.

CONCLUSION

Applying these principles to the above-cited *Evans* case, the Illinois Circuit Court for Cook County will likely dismiss that suit as barred by Illinois' workers' compensation exclusivity provision. Illinois' workers' compensation scheme applies broadly to "any injury or death sustained by any employee while engaged in the line of his duty as an employee," and Illinois' intentional tort exception requires proof of an employer's actual intent to harm. Because Mr. Evans' alleged contraction of COVID-19 will probably qualify as a work-related injury under Illinois law and Illinois' intentional tort exception would require Mr. Evans to show that Wal-Mart actually intended for him to get sick and die, his claim will likely be relegated to the jurisdiction of the Illinois Workers' Compensation Commission. What is important to note, though, is that cases similar to *Evans* could turn out differently depending on the employee's state of employment.

NOTE

1. *See Toney Evans v. Wal-Mart Inc., et al.*, 2020L003938 (Ill. Cir. Court, Cook County).