It Has Started: Supply-Chain, Warehouse and Retail Workers of Essential Businesses Are Filing Suit

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Supply-chain businesses that are appropriately characterized as "essential" have remained open for the delivery of critical supplies while everyone else has been told to close up shop and stay home. Now essential-business employees are contracting COVID-19 and filing suit. Following up on our earlier piece — "Is a Violation of a COVID-19 Order the Basis For Civil Liability?" — it is important to recognize that government directives, oftentimes couched as "recommendations," can come to define what it means to provide a reasonably safe workplace that protects employees from COVID-19. While common law negligence defenses consider the reasonableness of conduct, these directives will likely become the standard.

The cases that have been filed are overwhelmingly premised upon the timeless negligence construct. The negligence construct, simply put, imposes a duty to act as a reasonable person would under the circumstances. Nonetheless, while the negligence construct lives in the ordinary world of "reasonableness," infection-control guidance lives in the rapidly developing world of the science of COVID-19. Guidance on seemingly basic questions, such as the methods of transmission (*e.g.*, personal contact, mucus membrane only, airborne transmission) or even the virus's shelf life on different surfaces, of particular interest packaging and material handling equipment, can change by the day. All of this provides challenges for the supply-side business looking to protect its workforce.

The Centers for Disease Control and Prevention (CDC), the Occupational Safety and Health Administration (OSHA) and state and local health departments have pushed means and methods for employers to minimize the risk of transmission. As an example, the CDC has recommended that businesses develop disease preparedness and response plans and that businesses implement infection protection measures, including maintaining social distancing and providing personal protective equipment (PPE) like masks and hand sanitizer. Businesses will want to stay current on these ever-evolving recommendations. Lawyers will argue these are the minimum required protections and depending on the level of contagion, more should be done. The argument will follow that violation of the directive establishes liability under the legal doctrine of *negligence per se*.

A claim premised on *negligence per se* essentially seeks a declaration of unreasonable conduct for violation of a statute, regulation or government directive. Typically it is necessary to show that the statute, regulation or directive provides a private cause of action. See, *e.g.*, *Wagner v. Anzon, Inc.*, 684 A.2d 570, 575 (Pa. Super. 1996) (holding that there was no *negligence per se* claim based on violation of Philadelphia Air Management Code (Code) because, among other things, Code did not provide for private enforcement). At a minimum, the statute, regulation or directive must be sufficiently specific to create a standard of care. See, *e.g.*, *Young v. DOT*, 744 A.2d 1276, 1279 (Pa. 2000) (rejecting *negligence per se* claim based on regulations governing placement of warning signs along highways because regulations did not provide specific enough guidance on duty of care). The courts will seek to determine whether the law that was violated was designed to protect individuals like the plaintiff from the harm suffered by the plaintiff. Compare *Miller v. Hurst*, 448 A.2d 614, 618 (Pa. Super. 1982) (holding that unexcused violation of dog-leash law that resulted in dog bite is *negligence per se* because leash law meant to protect persons from such harms), with *Minnich v. Yost*, 817 A.2d 538, 540 (Pa. Super. 2003) (holding that violation of criminal statute prohibiting fraudulent concealment of wills was not *negligence per se* because purpose of statute was to ensure integrity of public records rather than protecting individual will beneficiaries from harm).

The more common approach is that a violation of a statute, regulation or directive will be introduced at trial as relevant evidence of negligence. See, *e.g., Alloway v. Bradlees, Inc.*, 723 A.2d 960, 967 (N.J. 1999) ("[V]iolation of a legislated standard of conduct may be regarded as evidence of negligence if the plaintiff was a member of the class for whose benefit the standard was established."). In addition to the violation, the fact-finder, whether jury or judge, will consider the degree and foreseeability of danger and the circumstances of the violation. For example, in *Alloway*, a worker was injured while operating a faulty dump truck. Id. at 963. The Court found that the fact finder could consider OSHA regulations governing hazard training in determining whether the contractor was negligent in the accident. Id. at 968-69. But, the Court remanded because it was for the jury to decide whether the contractor violated the regulation and the unreasonableness of any such violation. Id. at 970. So, businesses will be served by seeking counseling on effective, but sensible COVID-19 policies and practices that reflect government guidance and are current, as the directives, informed by science, evolve.

Despite a business providing appropriate PPE and implementing other sensible social-distancing protocols, suits, which have already been brought, may also allege that the business failed to enforce its COVID-19 policies, and lacked a reasonable Emergency Preparedness and Response Plan as required by OSHA. Such claims might be couched as anywhere from a failure to close to a failure to inspect or otherwise ensure that workers are wearing masks, washing hands or maintaining sufficient physical distance. Several suits have alleged failure to identify symptomatic employees, and failure to isolate or send symptomatic employees home. Supervisors need to be aware of COVID-19 policies and procedures issued by their employer and ensure compliance in the field.

Employee COVID-19 claims must, of course, be shown to have arisen at work. Medical causation is always a case-by-case issue. Claims made by employees directly against employers are typically first presented through the workers compensation scheme. However, employers are not always free from third-party liability. Although the Pennsylvania Workers' Compensation Act has an exclusivity provision that normally bars all employee claims against the employer, 77 P.S. § 481(a), there may be no bar to suit where the employer intentionally makes fraudulent misrepresentations that aggravate an employee's pre-existing condition. See *Martin v. Lancaster Battery Co.*, 606 A.2d 444, 448 (Pa. 1992) (recognizing exception to workers' compensation exclusivity where employer misrepresented blood test results and caused delay in treatment for employee). Similarly, in New Jersey, there is an exception that permits an employee to bring suit against the employer where the employer engages in intentional wrongdoing that creates a "substantial certainty" of bodily injury or death. *Van Dunk v. Reckson Assocs. Realty Corp.*, 45 A.3d 965, 967 (N.J. 2012).

COVID-19 exposure, injury and death claims are not only being presented against the employer. So, employers need to be mindful of possible third-party claims. For example, in jurisdictions like New York, a third-party sued by an employee for a work-related injury may seek contribution or indemnification from the employer if the employee suffered a "grave injury or death." N.Y. Workers' Comp. Law § 11. Businesses often outsource some of their operations to third parties, such as temporary staffing agencies or janitorial subcontractors, who may face suit outside the workers' compensation regime, thereby exposing the employer to possible third-party claims from those entities. In addition, commercial property owners are also being made party to these suits.

Both the CDC and OSHA have provided guidance for preparing workplaces for COVID-19. Pennsylvania, New Jersey and New York, through the respective health agencies, have also issued guidance to employers.

If you have any inquiries in regard to the potential for civil liability arising out of a violation of a government stay-at-home order or other COVID-19 order, contact Robert Devine (deviner@whiteandwilliams.com; 856.317.3647), James Burger (burgerj@whiteandwilliams.com; 856.317.3656) or Douglas Weck (weckd@whiteandwilliams.com; 856.317.3665).

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates here.