

Legal Risk

‘Take-Home’ COVID Lawsuits Spark Fears

CAN SOMEONE recover damages from a business if they claim that a family member caught COVID-19 at work and spread it to them? For California businesses, a court recently said that they might be able to. And courts in other states may use the decision as guidance.

A California appellate court in December ruled that a lawsuit filed by the widow of a 72-year-old man who died of COVID-19 in April 2020 could proceed. While the decision does not mean that she will win, it does mean that California courts will not automatically dismiss these kinds of suits.

Legal observers worry that the court green-lighting the “COVID-19 take-home” case to proceed could set off a cavalcade of similar lawsuits, and that if the plaintiffs are victorious it could open a whole new area of liability: Employers being liable for illnesses transmitted from one person to another in a workplace that leads to further infections among an employee’s family.

Business groups warned in court papers filed before the decision that such a ruling could prompt lawsuits by an infected employee’s family, friends and anyone infected by that circle of people.

The facts

The case decided by the Second Appellate California District Court of Appeal was filed by the widow, who was an employee of See’s Candy in South San Francisco. She alleges that the company did not take the appropriate steps to protect workers from COVID-19 in the workplace.

After the employee contracted COVID-19 at work, both her daughter and husband contracted it and four weeks later her husband died.

Late in 2020, she and her three daughters sued the company for allegedly causing his death.

The company argued that the suit should be dismissed because his death derived from an employment-related illness. Workers’ compensation law bars employees from suing their employers over workplace injuries and illnesses.

The trial court allowed the suit to proceed, and the company appealed. The appellate court’s decision means that the suit will proceed to trial, though the company could appeal to the state supreme court.

Why this case is important

This is the first appellate court decision that has cleared a COVID take-home lawsuit to go forward.

It’s legally binding only in California; however, judges in other states considering these types of suits may use it for guidance.

Business groups filed briefs supporting the company, saying that allowing lawsuits like this to proceed would open the door for suits by anyone in an infected employee’s family and friends – and anyone with whom the family and friends came into contact.

These suits would make it harder for small businesses to recover from the losses caused by the pandemic, they argued.

Unlike California, 30 states have enacted laws requiring individuals bringing lawsuits like this one to prove that the employer was

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Ca/OSHA Extends, Changes COVID Rules

CAL/OSHA's new COVID-19 workplace safety rules took effect Jan. 14. They extend earlier temporary rules until April 20.

Under the new rules, employees must get a test in a health care setting or clinic that is sent to a lab, or take a self-administered test in front of a supervisor or a health care representative. Tests that are self-administered and self-read (like those taken at home) are no longer acceptable under the new rules.

Employers can still offer self-read, self-administered COVID-19 tests to workers, but those that need to take a test after an exposure must adhere to the new testing rules.

Besides the new testing requirements, the extended rules make some other changes to the Emergency Temporary Standard (ETS). Here are the changes all employers need to know:

Testing – Under the amended rules, employers must provide COVID-19 testing to all employees (including fully vaccinated, asymptomatic staff) who have come into close contact with a COVID-19-positive individual or in an outbreak setting.

Also, employers must make COVID-19 testing available at no cost, during paid time, to all employees who have had close contact or during an outbreak.

Masks – The rules largely follow orders by the California Department of Public Health, which currently requires employees to wear face coverings while indoors.

The new rules define face coverings as including:

- Surgical masks (including N95 or KN95 masks),
- Medical procedure masks,
- Respirators worn voluntarily, and
- Masks made of tightly woven fabric or non-woven material of at least two layers (fabric masks cannot let light pass through when held up to a light source).



Exclusion from work – The renewed ETS keeps in place rules requiring employers to exclude employees who are positive for COVID-19 until return-to-work requirements are met.

Employers also must exclude employees who have had close contact with a positive individual, unless the employee is fully vaccinated and asymptomatic.

Also, fully vaccinated employees who exhibit no symptoms after close contact with a COVID-positive individual do not need to be excluded from the workplace, but starting Jan. 14 they must wear a face covering and maintain social distance for 14 days while at work.

The takeaway

As COVID-19 is surging right now, it's important that California employers follow the standards put in place by Cal/OSHA in order to avoid any penalties or fines. It's also the best way to continue protecting employees that are coming to work rather than telecommuting. ❖

Time to Post Your OSHA Form 300A

Employers with 10 or more employees must post their completed OSHA Form 300A starting Feb. 1 through April 30.

The form must be posted where the company usually posts other employee notices.

Employers who must file electronically

- Employers with 250 or more workers at an establishment.
- Employers with 20-249 employees in high-hazard industries.

COVID-19 cases

Employers must also record work-related COVID-19 cases like any other occupational incident. To be recordable, an illness must be work-related and result in one or more of the following:

- Days away from work
- Restricted work or transfer to another job
- Medical treatment beyond first aid
- Loss of consciousness
- A significant illness
- Death.

If a work-related COVID-19 case meets any of these criteria, covered employers must record the case on their 300 and 300A forms.

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Experts Expect More 'Take-Home' COVID Lawsuits

grossly negligent. California law applies a lesser standard.

Two dozen similar suits have been filed around the country. A quarter of them were dismissed and some were settled out of court.

The takeaway

Those bringing the suits still face a difficult task – proving that an employee contracted the virus at work and that the exposure at work

resulted in the family member or friend becoming infected.

Still, until a verdict comes down, businesses face a risk of being sued by their own employees for similar reasons. Even if a company wins its case, it will still have to pay for legal fees.

It's important that employers continue to follow OSHA and Centers for Disease Control guidance on protecting workers from COVID-19 to avoid being swept up in similar litigation. ❖

Delays, Insurance Costs Burden Owners, Builders

INCREASING CONSTRUCTION project delays during a hardening market for builder's risk and liability insurance are creating headaches for project owners and contractors.

If your project suffers from delays, you may find it difficult or costly to extend the length of your insurance coverage as insurers have tightened their underwriting policies and some have stopped underwriting construction projects altogether.

Owners need to understand the insurance marketplace and take steps in advance to keep insurance issues from throwing a monkey wrench into a project.

Why Delays Are Happening

- Projects are increasingly complicated and have long durations.
- Initial budgets and estimated timelines may prove to be inadequate or over-optimistic.
- The process of obtaining permits is taking longer.
- Increasingly volatile weather conditions are setting some projects back, as hurricanes, floods and wildfires can prevent work from starting or damage work already completed.

Insurers' response

This is happening at a time of persistently tight insurance market conditions, growing court damage awards and property damage losses from adverse weather events.

Some insurers have been cutting back on insuring construction projects, while others have pulled out of the construction market entirely. Those that remain are hiking rates, increasing deductibles, and adding provisions that reduce the scope of coverage.

Consequently, when an insurer is asked to extend the coverage expiration date for a construction project, the agreement may come with these unpleasant strings attached.

Also, the project budget likely did not contemplate increases in insurance costs and uninsured loss costs midway through the project.

What you can do

Fortunately, there are steps you can take to get ahead of potential problems:

Identify solid insurers – At the start of the process, owners and contractors should work with us to identify insurers with experience providing construction coverage.

Some insurers may jump in and out of markets, depending on how profitable they appear at the time. Multi-year construction projects require insurers who will not exit the market when their profit margins slip.

Where one or more of the project's insurers have departed the market, it may be impossible for the project owners to negotiate a solution.

But, insurers that have long-standing relationships with owners and contractors may be willing to negotiate new terms.

Negotiate automatic extensions – Owners and contractors should attempt to include automatic coverage extensions during negotiations for the original policies.

These projects involve multiple insurers providing different layers of coverage and it's important to try to negotiate these coverage extensions with all of them. If one insurer drops out, it may be possible to get some of the others to fill in the gap.

Consider a 'captive' – In some cases, contractors may have the option of turning to "captive" insurers to fund higher retentions and uninsured losses. A captive insurer covers the risks of its owners.

Stay on schedule – To avoid these problems try to stay on schedule. This requires coordination among the contractors and subs and strong project management.

With the current supply-chain and labor shortage problems not easing anytime soon, project delays will likely continue. Insurance problems may complicate that further, but they can be managed.

Before your next project, call us so we can get the ball rolling early. ❖



Employees Responsible for 85% of Trade Secret Theft

TRADE SECRET theft by employees is a serious and growing problem in the U.S. According to an analysis of federal court cases, 85% of such theft is committed by employees or business partners.

Lately, companies have been focusing on high-value, high-tech cyber attacks by outsiders that breach databases, but threats from the inside are just as costly. Despite that, a survey by PricewaterhouseCoopers found that only 49% of organizations surveyed had a plan for responding to insider threats.

Trade secrets are particularly susceptible to theft because they consist of protected information with economic value. Company insiders often find that information too tempting to leave behind when changing employers, or when seeking new employment.

That could lead to a former employee leaking that info to their new employer or using it in other ways to the detriment of their prior employer.

Protect Company Secrets from Internal Misuse

- **Identify your secrets** – In order to protect your trade secrets, you need to know what they are and where you store them. Broadly speaking, any confidential business information which provides an enterprise a competitive edge may be considered a trade secret. Trade secrets encompass manufacturing or industrial secrets and commercial secrets. Legally, you should know that different states define trade secrets differently, so you should familiarize yourself with California's definition.
- **Limit access** – Restrict trade secret access to those who have a need to know. Have these employees sign a confidentiality agreement in which they:
 - » Acknowledge receipt of confidential material.
 - » Agree to keep the material confidential.
 - » Agree to return the material when employment ends.
 - » Agree to advise you of the identity of their new employer and to make the new employer aware of the agreement.
 - » Agree to allow you to provide a copy of their agreement to a new employer.
 - » Acknowledge that forensic analysis may be done on their devices, such as computers and phones, when their employment ends.
 - » Acknowledge that irreparable harm would be done if they violate it.
- **Use non-disclosure agreements** – Have employees who have access to your trade secrets and customer information sign non-disclosure agreements. You can customize the agreement to ensure it reflects the worker's role in the company, so you have a better chance of enforcing the agreement should it be breached. Do not use a "one-size-fits-all" form and don't have workers sign such agreements when there is no legitimate business reason.
- During employee meetings, regularly address the importance of keeping information confidential. This will convey that you are serious about safeguarding your company information, particularly when an employee leaves the company.
- Conduct exit interviews with employees who had access to trade secrets and:
 - » Confirm in writing the obligations the employee has by contract, or otherwise by law, to keep confidential information confidential and, if applicable, not to compete or solicit.
 - » Confirm that all confidential material has been returned.
 - » Inquire about the person's next job.
- Perform forensic analysis on computers and other devices of departed workers who had access to trade secrets to determine whether any theft of trade secrets or other prohibited conduct occurred.

The takeaway

While the above steps are not foolproof, they can go a long way towards protecting your company's trade secrets. And if an employee or departing worker makes off with any of this data, you will be in a better position to minimize and mitigate any harm that may come from it. ❖

