



Employer Liability for COVID-19 Infection

As more workers return to in-person employment while the coronavirus pandemic continues, many employers are becoming increasingly concerned about potential liability arising from work-related COVID-19 exposure. With respect to one's own employees in Texas, an employer's liability appears to be limited. The Texas Department of Insurance has stated that COVID-19 may be an occupational disease as defined by the Texas Workers' Compensation Act if it is contracted as a result of employment. Thus, work-related COVID-19 infections will be covered by workers' compensation for subscribers. Therefore, workers' compensation subscribers in Texas cannot be sued for COVID-19 work-related exposure even if such exposure is caused by the employer's own negligence. The only exception would be in the case of an employer's gross negligence which results in employee death. While COVID-19 can, of course, result in death in some cases, plaintiffs seeking to impose gross negligence on an employer will have a substantial burden. They will have to prove workplace exposure and the likelihood of serious injury. They must further demonstrate that the employer knew of such likelihood but did not care. This standard will present difficulty for any potential plaintiff. As exceptions to workers' compensation vary from state to state, employers who maintain a workforce in numerous states may face greater liability.

However, employers who do not subscribe to workers' compensation (or who have employees who have opted out of the workers' compensation system) the potential for liability is substantial. Employees who can establish any non-subscriber employer negligence can achieve a full recovery of damages. Thus, this global pandemic provides another justification for becoming a workers' compensation subscriber.

An additional point of concern arises from the fact that workers' compensation does not insulate contractors from lawsuits by employees of other contractors on the same project (except under CCIP and OCIP plans). Thus, contractors should likely brace for COVID-19 related negligence actions of this type. Such suits will likely target contractors on projects with large COVID-19 infection clusters who do not take substantial steps to protect against the spread of COVID-19 among workers.

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