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Is Opening for Business Also Opening to Liability?

by RaeAnne Marsh

Processes and procedures of bringing their employees back to the workplace are only one area of concern for businesses planning their reopening after a COVID-19 closure.

COVID-19 may have one more disruption to bequeath to business: civil suits of personal injury claims.

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Individuals have already widely exhibited a concern for their personal safety in their interactions. If, as businesses open up again, the numbers start going up of people contracting the disease, what additional liability might businesses be facing?

The novel coronavirus is highly contagious, but that is actually a potential plus on the side of businesses being sued for a negligence claim. Businesses do owe their customers a standard of care. But someone bringing suit must show not only that the business breached that duty and that he or she does actually have an injury, but most significantly that the injury was caused by the business's breach. Marc Lamber, attorney in Fenmore Craig's Phoenix office who is a Martindale Hubbell AV Preeminent-rated trial attorney and has been recognized as a leader in the personal injury context, notes that final point of proof must overcome difficulties uncommon to this virus: the wide community spread, the delay in manifesting symptoms after infection, and the fact that some infected people are asymptomatic. "There is so much community spread/community exposure associated with the coronavirus. How do you prove that you contracted the virus at that precise moment at a particular place — at a restaurant or a department store, or you ordered pizza and took the pizza from the delivery person, or you had a pipe burst in your house and you had a repair person come to repair that, or your spouse went to a different store and brought it back?"

CDC guidelines are fluid — when they're released at all — and are changing as we learn more about the disease. But, while noting that the civil standard for demonstrating causation is "by a preponderance of the evidence (as opposed to the criminal standard of 'beyond reasonable doubt')", Lamber explains there are certain types of businesses against which a personal injury claim might be easier to prove. These include businesses where customers are at the business for a longer duration of time, versus a drive-through, because the probability of contracting the virus increases with the amount of time spent in the business; business that have a higher concentration of people closer together, such as a sporting or music event where people are crowded together; and businesses that involve more touching, such as those that sell hand-held electronic devices, where people are touching devices and putting them down and someone else is picking them up. In such environments, there are more avenues to contract the virus.

In a possible balance to that, Lamber says he is seeing certain businesses such as long-term care facilities being given civil immunity to an extent, with claimants having to prove gross negligence (reckless disregard) or willful misconduct against the business. "It's a higher bar to overcome."

A related issue for businesses is premises liability. This relates to the occupiers of a property, such as retailers; not to the owners of the property. As business owner, the occupier of a property owes a duty to its business invitees — customers — to maintain its premises in a reasonably safe condition, Lamber explains. In the surge he expects to see in negligence claims, he says, "Personal injury lawyers evaluating whether they can file a claim will be analyzing if they have a negligence claim or premises liability claim or both. To whom is the duty owed, and by whom?"

Claimants must prove that the condition of the property caused them to contract the virus, which faces the same hurdles as with the negligence issue discussed above, Lamber notes. "Key for businesses is to show they are taking all reasonable precaution." Businesses should follow CDC and OSHA guidelines and those of the Arizona Department of Health Services. Claims will involve the facts of specific circumstances as well as an evaluation of nuances such as whether the guidelines are required or recommendations.

Negligence claims by employees fall into a different category. Rather than a civil claim, these would be workers' compensation claims. Employees' exposure is greater than that of customers; as a worker's comp claim, though, the remedy is more limited. Employees cannot sue for pain and suffering, but can claim compensation for a percentage of wages lost due to having to be out of work. Another important difference between civil and workers' comp claims, Lamber explains, is the burden of proof shifts from the individual having to prove negligence by the business to the business having to prove it was not negligent. Lamber points to what happened in California the very day before our interview: "Governor Newsome created an executive order creating a rebuttable presumption for essential workers — that if they contract COVID19 then they contracted it at work." While Arizona does not place this presumption on businesses at this time, it's important to note that, in taking this action, California is joining a growing number of states that do.

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