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OPINION

Analysis

## Flurry of COVID-19 lawsuits may be on the way as Arizona reopens

Could businesses be legally responsible if a customer or employee contracts coronavirus?



Profile picture of Marc Lamber

Posted May 12, 2020, 3:00 pm

Marc Lamber  
Special to TucsonSentinel.com

Now that commerce is resuming across Arizona, business owners are entering into uncharted territory taking a risk that customers and employees will catch COVID-19 at the business. If that happens, who is responsible?

The answer to this question is not so simple. It will depend on a number of factors, which are discussed below.

### Customer claims

If a customer visits a retail establishment and later develops coronavirus, under what circumstances, if any, would the business be legally responsible? The analysis would begin with two types of legal claims, negligence and premises liability. For both claims, the customer would bear the burden of proof. This means that the customer would be responsible for presenting the evidence to prove his or her case.

Generally speaking, negligence is the failure to exercise the care toward another that a reasonably prudent person would exercise under similar circumstances. It requires proving four elements.

1. the existence of a legal duty owed to the person
2. a breach of the duty
3. the person suffers an injury
4. the injury was caused by the breach

Premises liability, a separate legal theory generally based on principles of negligence, relates to the duty owed by a landowner or business owner to a visitor to his or her property. For a customer who enters a retail business, that person is legally considered a "business invitee." The duty of a business owner to its invitees is to maintain its premises in a reasonably safe condition.

For a customer to have a successful negligence and/or premises liability claim against a business, he or she would start by proving the business owner breached the duty to maintain the premises in a reasonably safe condition and/or otherwise fell below the requisite standard of care.

This analysis will be highly fact-specific, and may involve presenting evidence regarding a retailer's failure to implement, or follow CDC, OSHA and/or state guidelines related to COVID-19 (e.g., social distancing, masks, cleaning, etc.).

Even if the customer can establish that the business breached the requisite standard of care and/or breached the duty to maintain the premises in a reasonably safe condition, it likely will be even more challenging to prove that the breach caused him or her to contract the coronavirus.

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Because the coronavirus is very contagious and widespread, and because the symptoms can take several days to manifest, there may be many potential sources for contracting the disease.

Beyond liability, the customer will also need to prove that they suffered damages such as temporary or permanent injury to their body, pain and suffering and, if applicable, loss of their ability to work for a period of time. With respect to claims specifically against healthcare workers, Gov. Doug Ducey issued an executive order that raised the bar even higher to prove liability. Called the "Good Samaritan Order," a person who alleges that a healthcare worker did not render appropriate treatment with respect to the virus would need to prove that the worker was grossly negligent or engaged in willful or reckless misconduct, rather than ordinary negligence.

### Employee claims

If an employee returns to work, and contracts coronavirus, he or she has more limited options.

In Arizona, an employee is generally not allowed to sue his or her employer for negligence, premises liability or otherwise, unless there is an exceptional circumstance. Instead, the employee would bring a Workers' Compensation claim, which is an exclusive remedy.

For such a claim, the employee does not need to prove that the employer breached a duty (e.g., to keep the premises safe). However, among other things, the employee must prove legal causation, namely that he or she contracted the coronavirus while on the job - thus entitling him or her to workers' compensation benefits.

The benefits can include coverage of medical bills and a percentage of lost earnings, but they do not include pain and suffering, which is a damage available under a negligence and premises liability claim.

Some states, like California, have issued orders that create a rebuttable presumption that an essential worker who is infected with coronavirus contracted the virus on the job. Thus, the worker does not need to prove that he or she contracted the virus on the job and, instead, the burden is on the employer to prove otherwise.

At this time, Arizona has not adopted the rebuttable presumption standard.

### Conclusion

We are in unprecedented times and it is likely, absent a federal or state liability shield for business, that there will be a flurry of personal injury claims filed by business customers and workers' compensation claims filed by employees asserting they contracted COVID-19 at the business and suffered damages or are otherwise entitled to benefits.

While causation will be a steep hurdle to overcome for these claimants, the time and expense for business owners and/or their insurers to defend will be very real.

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Businesses that adhere to the CDC, OSHA, state and local guidelines for operations and can prove compliance will be best situated to avoid prospective lawsuits and prevail if one is filed.

Marc Lamber is a Martindale Hubbell AV Preeminent-rated trial attorney. A director at Fennemore Craig, Lamber has been featured in national and local media, including the Arizona Republic, USA Today, ABC News, The Wall Street Journal, Forbes, the ABA Journal and many others.

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TucsonSentinel.com's nonprofit newsroom is dedicated to providing our community with the latest news & information about the coronavirus outbreak.

Telling us what you need to know will help shape our local reporting about how this global pandemic is affecting Southern Arizona. (We'll sign you up for the free TucsonSentinel.com email update newsletter.)

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What are your biggest questions about the coronavirus? What do you need to know? Help us understand what data, information and resources to gather and publish.

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Marc Lamber

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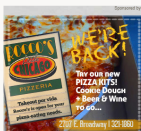
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