

## Update: Can Employees Sue Their Employer for Contracting the Coronavirus?

Drew Sorrell & Morey Raiskin

Apr 08, 2020



By: Drew Sorrell & Morey Raiskin

In the March 30 article entitled "Can Employees Sue Their Employer for Contracting the Coronavirus?", we discussed whether an employer may be held liable for an employee's contraction of COVID-19. On Monday, April 6, the first lawsuit was filed by the estate of an employee against an employer for alleged wrongful death due to complications of the COVID-19 virus.

As noted in the previous article, workers' compensation does not usually provide coverage to workers stricken with an "ordinary disease of life", such as a cold or the flu. There are exceptions, however, which the courts determine by applying a four-part test to the facts of each case.

Given that various levels of state and local governments have now issued stay-at-home orders, the facts have begun to tip towards COVID-19 being an exception to this general exclusionary rule, or at least we believe will be the case. Moreover, employers who choose to argue that workers' compensation does not apply expose themselves to the potential of unlimited damages, potential punitive damages, and the vagaries of a jury trial.

At this point, the arguments are not a slam dunk for the employee to avoid the limitations of workers' compensation remedies or for the employer to be exposed in tort. In Florida, there can be liability—at least theoretically at this point—for failing adequately to protect employees against the virus.

As to the case filed on Monday in Illinois, the family of Wando Evans sued Walmart for alleged wrongful death caused by complications related to the coronavirus. The

lawsuit claims that the store engaged in "willful and wanton" conduct (language designed to side-step workers' compensation and raise the possibility of punitive damages) for not following public safety measures recommended by the Centers for Disease Control and Prevention. It further alleges that the store knew or should have known that individuals at the store were at a very high risk of infection and exposure due to the high volume of people present at the store, both workers and shoppers, on a daily basis.

The legal complaint goes on to allege that the store knew other employees were showing signs of sickness, was not adequately training employees, was not adequately sterilizing, was not adequately providing distancing or personal protective equipment, did not have effective policies and procedures for addressing employees who became sick or showed signs of potential illness, did not adequately sanitize the store's public or restricted areas, or take other appropriate and reasonable protective measures suggested by the CDC, OSHA, or state and local health departments.

Whether the factual and legal allegations of the lawsuit can or will be proven remains to be seen. In the meantime, the defense of the lawsuit will cost significant time and money, posing significant risk to the employer regardless of the end result. Likewise, the tragedy of the death itself cannot and should not be ignored.

It is worth noting that an employee need not actually pass away due to the virus as liability and damages may arise for sickness, too. If employees continue to work during the COVID-19 crisis, it is important to train employees, provide personal protective gear for the specific job or job-site, and maintain and enforce effective policies and procedures which address removing potentially sick employees from the workplace. Employers need to also ensure physical space and separation, effectively sanitize the work and customer spaces, and take all other appropriate and reasonable steps suggested by the federal, state, and local governments.

If you have questions regarding employment or tort (negligence) issues or other questions regarding your business in the context of the coronavirus, please contact one of the lawyers at Lowndes.

For up-to-date news please follow our Coronavirus (COVID-19) Resource Center page.