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Avoiding Unsafe Workplaces: Non-OSHA Safety Lawsuits and How to Prevent Them

Types of Unsafe Workplace Litigation Claims

1. Public Nuisance

In many states, including California, Montana, New York, Florida, Pennsylvania, Arizona, Texas, and Utah, employees have filed claims against employers alleging that the employer has created a “public nuisance” as the result of failing to maintain a safe and healthy working environment during the pandemic. The lawsuits focus not on OSHA requirements, but on guidance from the CDC and local governments, or best practices for certain industries.

Many of the lawsuits target employers in healthcare, retail, fitness, and meat processing or other manufacturing settings.

The most common allegations in these lawsuits include:

- Failure to prevent spread
- Failure to protect workers from angry customers
- Allowing customers/employees not to wear masks
- Failure to provide PPE, face coverings, cleaning supplies
- Forcing “contagious workers” to keep working
- Second-guessing employees’ claims of need for quarantine due to exposure
- Forcing employees to work in “close quarters”
- Handwashing opportunities are limited
- Taking sick leave is discouraged/ Coming to work while sick is incentivized

2. Public Policy

Many states permit terminated employees to file common law claims of wrongful discharge in violation of public policy. These claims are exceptions to the at-will employment doctrine. In the context of COVID-19, public policy claims are being filed in conjunction with or as an alternative to whistleblower claims. In some instances, public policy claims are being filed when it appears that no other actionable claim exists. In other instances, the claim is included with a laundry list of other employment claims. The common thread is an employee who complains of unsafe work conditions and is subsequently terminated. The sources of public policy supporting these claims typically includes CDC guidance or state and local orders or recommendations.

3. Workers Compensation



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Many states have permitted employees to file workers compensation claims upon contracting COVID-19. In most cases, infected workers do not seek workers compensation benefits unless they have experienced serious complications. The critical issue for employees seeking workers compensation in connection with COVID-19 is establishing causation. Some claimants are attempting to establish causation through contact tracing evidence. Many states will presume causation if there is a “hot spot” of COVID-19 cases in a particular workplace, or the particular workplace setting presents a greater risk for COVID-19 exposure, such as healthcare settings.

4. Premises Liability

Employees typically cannot file premises liability claims, including negligence claims, against their employers due to workers compensation exclusivity. However, our survey of COVID-19 related lawsuits shows cases filed alleging premises liability claims by business invitees and customers tied to employee acts or omissions, such as failure to follow safety protocols and failure to wear face coverings.

5. Wrongful Death Actions

Similar to premises liability claims as mentioned above, families of employees typically cannot sue an employer for wrongful death. Employers are, however, seeing COVID-19 related wrongful death claims tied to employee acts or omissions.

6. Work Stoppages

In both union and non-union environments, employers continue to experience work slowdowns or stoppages stemming from allegations of unsafe workplaces related to COVID-19.

7. Emergency Injunctions

Employers, Unions, and Employees have sought injunctive relief in courts related to COVID-19 unsafe workplace issues. In these matters, a party seeks a temporary restraining order seeking to force an employer, union, or employee to immediately take action of refrain from acting. Examples of TRO's sought include seeking business closures, demanding additional PPE, and requiring employers to conduct training. These matters are highly fact specific, depend greatly upon the court's view of the equities, and must be adjudicated quickly.

8. Complaints to Local Health Authorities

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Finally, employers have experienced complaints lodged by employees or customers to local health authorities regarding allegations of unsafe workplaces. In some cases, these complaints and inspections have played a part in subsequent litigation.



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Best Practices to Avoid Claims and Reduce Risk

- Communication Best Practices
 - Adopt crisis management techniques in your communications plans
 - “Tell it first, tell it all, tell the truth”
 - Document, communicate, and repeat your safety plan and measures
 - Use several different methods to communicate the same information
 - In person training
 - On-line training
 - Written materials
 - Posters and notices
 - Refresher training
 - Listen to your workforce
 - Provide a forum for workers to express concerns about COVID-19
 - Be consistent and flexible
 - Regularly express gratitude to your workforce

- Create and Maintain Workplace Safety Evidence
 - Adopt and update a COVID-19 specific written safe workplace plan
 - Social Distancing
 - Cleaning and sanitizing
 - PPE
 - Face Coverings
 - Respiratory Hygiene
 - Hand Washing
 - Quarantine Instructions
 - Health Screening
 - Audit your safety plan
 - Consider having employees sign and acknowledge an employee conduct policy
 - PPE Documentation
 - Cleaning Documentation
 - Training Documentation
 - Proof of Postings
 - Hand Washing and Respiratory Hygiene Reminders

If you have any questions about this form, please contact: Rebecca Bennett | Cleveland, OH | Telephone: 216-274-6903 | E-mail: rebecca.bennett@ogletree.com or Natalie Stevens | Cleveland, OH | Telephone: 216-274-6904 | E-mail: natalie.stevens@ogletree.com

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