

# Employment-Related Claims in the Wake of COVID-19: Part I

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# Presenters

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# Today's Agenda

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- **OSHA and Other Workplace Safety Claims**
- **Negligence and Other Tort Claims**
- **Workers' Compensation Claims and Exclusivity**
- **Leave and Accommodation Claims**

# OSHA and Other Workplace Safety Claims

# OSHA Appears to be Overwhelmed

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- According to the National Employment Law Project, OSHA is operating with the **lowest number of inspectors** in more than 40 years
  - 1,469 inspectors in 1980
  - Currently there are only 862 inspectors
  - At the current staffing level, it would take OSHA 165 years to inspect each workplace under its jurisdiction
- OSHA has received **over 4,000** COVID-19 safety and health complaints and **over 1,000** whistleblower complaints.
  - As of June 1, the agency has closed nearly 3,000 of these complaints
  - First citation issued on May 18, 2020, to a nursing home in Georgia

# Relevant OSH Act Provisions and Regulations

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- **OSH Act's General Duty Clause:** employers must furnish “a place of employment . . . free from recognized hazards that are causing or are likely to cause death or serious physical harm.”
- States can adopt OSHA-approved plans
- Instead of issuing virus-specific regulations, OSHA has relied upon existing rules such as **29 C.F.R. § 1910, Subpart I** which requires an employer to provide appropriate personal protective equipment (“PPE”) and training such as:
  - PPE for eyes, face, head, and extremities
  - protective clothing, respiratory devices, and protective shields and barriers if necessary for the occupational exposure to the hazard
  - Training regarding when PPE is necessary, how to properly don/doff PPE, proper care for PPE, and the limits of PPE
  - Retraining where changes in the work environment or updates to PPE render the previous training inapplicable or obsolete

# OSHA Investigation Process

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- OSHA will not reveal the name of the complainant
- OSHA will only conduct an on-site inspection where at least one of the following eight criteria are met:
  - A written complaint by an employee or employee representative that provides sufficient detail for OSHA to determine that a violations likely exists or that an imminent danger exists;
  - An allegation that a hazard caused a physical harm and that the hazard still exists;
  - A report of an imminent danger;
  - A complaint about a company in an industry covered by one of OSHA's local or national emphasis programs;
  - An Inadequate response from an employer following an off-site investigation;
  - A complaint against an employer with a history of egregious, willful or failure-to-abate OSHA citations within the past three years;
  - Referral from a whistleblower investigator; or
  - Complaint at a facility scheduled for/undergoing an OSHA inspection

# OSHA Investigation Process (cont'd)

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- Off-site investigations are generally conducted via phone/fax
  - OSHA calls the employer, describes the alleged hazards, and follows up with a fax or letter
  - Employer must respond within 5 days, identifying in writing any problems found and noting corrective actions taken or planned
  - If response is adequate, OSHA will generally not conduct an on-site inspection
  - OSHA will send a letter to the employee who filed the complaint, informing the employee of findings and any citations and proposed penalties

# OSHA Investigations During COVID-19

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- Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (May 19, 2020)
  - Supersedes April guidance that relaxed certain rules
  - Resumption of on-site inspections in areas where infections have slowed
  - Permits remote inspections via phone/fax in areas where coronavirus is still prevalent
  - Gives regional officials discretion over how to investigate complaints involving high-risk employers (e.g., hospitals, nursing homes)

# OSHA's COVID-19 Guidance

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- OSHA has released approximately 15 directives and guides related to COVID-19, including:
  - “Guidance on Preparing Workplaces for COVID-19”
  - “Social Distancing at Work”
  - “Prevent Worker Exposure to Coronavirus”
- Recommendations include:
  - Encouraging workers to stay home if they are sick.
  - Isolating any worker who begins to exhibit symptoms until they can either go home or leave to seek medical care.
  - Establishing flexible worksites (e.g., telecommuting) and flexible work hours (e.g., staggered shifts), if feasible.
  - Implementing engineering controls such as high-efficiency air filters, increased ventilation rates in the work environment, physical barriers (e.g., clear plastic sneeze guards), and separating employee work stations

## OSHA's COVID-19 Guidance (Cont'd)

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- OSHA has also released Guidance and safety tips for specific industries (e.g., healthcare, restaurants, manufacturing, construction, retail)
  - In the healthcare industry, where many tasks fall into the “high” or “very high” risk categories, the guidance recommends isolating patients with suspected or confirmed COVID-19; implementing systems for cleaning and disinfecting; and providing extensive PPE such as gloves, gowns, eye/face protection, or NIOSH-certified N95 filter face piece respirators or better
  - In the retail industry, where many tasks are categorized as “lower” or “medium” risk, the guidance recommends implementing measures to maintain social distance and to reduce store density, but does not generally recommend “PPE beyond what [is used] during routine job tasks” unless a risk assessment warrants the use of additional items

# Calls for OSHA to Enact Emergency Safety Regulations

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- OSH Act gives DOL authority to issue an emergency temporary standard if employees are exposed to grave dangers from new hazards
- Criticism has emerged regarding OSHA's refusal to issue emergency standards:
  - AFL-CIO
  - Senators Murray, Baldwin and Heinrich
  - David Michaels

## Calls for OSHA to Enact Emergency Safety Regulations (Cont'd)

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- On May 18, 2020 the AFL-CIO filed suit seeking to compel OSHA to issue an Emergency Temporary Standard (“ETS”) for Infectious Diseases
  - Alleged that the AFL-CIO had already petitioned OSHA to issue an ETS, but that OSHA had “neither responded directly to, nor taken formal action on... [the] pending ETS petitions, nor ha[d] it shown any inclination to adopt mandatory, legally-enforceable, COVID-19-specific rules to protect workers.”
- D.C. Circuit dismissed the case on June 11 stating:
  - “[I]n light of the unprecedented nature of the COVID-19 pandemic, as well as the regulatory tools that OSHA has at its disposal to ensure that employers are maintaining hazard-free work environments . . . OSHA reasonably determined that an ETS is not necessary at this time.”
  - “OSHA’s decision not to issue an ETS is entitled to considerable deference.”

# Secretary Scalia and OSHA Stand By Existing Regulations

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- Secretary Scalia responded to the AFL-CIO's letter, stating:
  - “OSHA’s website contains extensive guidance on the virus for the benefit of workers and employer and, in fact, the cop is on the beat.”
  - A temporary emergency standard is unnecessary because “employers are implementing measures to protect workers” and “employers who fail to take steps are likely violating existing OSHA obligations”
  - OSHA considers industry-specific guidance to be “more valuable” than a temporary emergency standard

# Secretary Scalia and OSHA Stand By Existing Regulations (cont'd)

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- OSHA's Principal Dep. Asst. Secretary, Loren E. Sweatt testified before the House Education and Labor Committee's Workforce Protections Subcommittee on May 28:
  - Existing standards “serve as the basis for its COVID-19 enforcement” and are effective to ensure workplace safety during the pandemic.
  - “As our medical professionals and scientists learn more about the virus, guidance can be easily updated, while regulations are very cumbersome to revise. Guidance also allows us to speak more specifically to particular types of workplaces and controls than would be practicable in a generally applicable rule.”

# Legislation to Compel Creation of Emergency Safety Standard

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- Democratic lawmakers have introduced a number of bills that would require OSHA to issue a temporary emergency standard, including:
  - **COVID-19 Health Care Worker Protection Act**
  - **COVID-19 Every Worker Protection Act**
    - Both bills would require OSHA to promulgate an ETS for health care sector employees and other categories of employees identified as having an elevated risk of exposure from occupational exposure to COVID-19. Both bills provide that the DOL must subsequently promulgate a permanent standard to protect these workers from exposure to Covid-19.

# Primary Jurisdiction Doctrine

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- In cases brought by employees that raise health/safety issues in light of Covid-19, an employer is likely to raise the “primary jurisdiction” doctrine as a defense
  - Common-law doctrine that allows a court to refer a matter to an administrative agency for ruling in the first-instance, even where claims are properly before the court
    - In applying the primary jurisdiction doctrine, courts consider:
      - (1) whether the issues in the case are within the special competence of an administrative body; and
      - (2) whether the court’s ruling on the issues before it could result in inconsistent regulation of businesses in the same industry

## Primary Jurisdiction Doctrine (cont'd)

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- *Rural Community Workers Alliance v. Smithfield Foods, Inc.*, No. 20-cv-06063 (W.D. Mo. May 5, 2020)
  - Plaintiffs brought claims for public nuisance and breach of duty to provide a safe workplace during Covid-19 pandemic against Defendant employer-operator of several meat processing plants
  - Plaintiffs alleged several of Defendant's processing plants had become "hot spots" for Covid-19 and that Defendant had failed to implement precautions recommended in OSHA's *Meat and Poultry Processing Workers and Employers — Interim Guidance*.
  - Court decided that the primary jurisdiction doctrine applied and favored dismissal of Plaintiff's claims (without prejudice) so that Plaintiffs could "seek relief through the appropriate administrative and regulatory framework."
    - Court found that the first factor of the primary jurisdiction doctrine favored dismissal without prejudice because Plaintiff's claims turned on whether Defendant was complying with OSHA's interim guidance, and that OSHA was better positioned to determine such compliance.
    - Court reasoned that the second factor of the primary jurisdiction doctrine favored dismissal because only deference to OSHA's determination of compliance would ensure national uniform application of the interim guidance.

# Negligence and Other Tort Claims

# COVID-19 & Increased Employer Tort Liability

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- Return to work = concerns over COVID-19 liability exposure
- Potential claims from:
  - Employees who become infected in the workplace;
  - Employees' family members, who also become infected; and/or
  - Estates of employees who passed away from COVID-19.
- Courts already seeing COVID-19 workplace tort claims
  - Claims largely focused on general theories of negligence
  - Some other torts (i.e., public nuisance)



# Potential Theories of Negligence

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- » failure to properly screen employees for COVID-19
- » failure to protect employees from symptomatic persons
- » failure to cleanse and sanitize the workspace
- » failure to provide personal protective equipment
- » failure to implement a social distancing policy
- » failure to implement a telework or work-from-home policy
- » failure to implement various government guidelines

# Establishing Negligence

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- **Standard of Care**

- Open issue, but likely to be shaped by:
  - Guidance from public health agencies (i.e., OSHA, CDC); and
  - Scientific developments

- **Breach of Duty**

- Employers knowledgeable of risk (i.e., widespread COVID-19 media coverage)
- Failure to take reasonable steps to prevent exposure is highly fact-specific inquiry

- **Causation**

- Highly infectious diseases pose challenges for causation
- Contact tracing to make causation more feasible

# Other Tort Claims

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- **Wrongful Death**
- **Public Nuisance**
- **Intentional Infliction of Emotional Distress**
- **Fraudulent & Intentional Misrepresentation**



# COVID-19 Tort Liability: Risk Mitigation Strategies

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- **Follow best practices and governmental regulations & guidance**
  - Look to OSHA, the CDC, & other government agencies
- **Take proactive employee safety measures & spread the word**
  - Develop policies that align with regulations & guidance and communicate to employees
- **Take proactive risk mitigation measures**
  - I.e., class action waivers & sufficient liability insurance coverage

# Workers' Compensation Claims and Exclusivity

# Workers' Compensation Generally

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- Coverage for **most employee workplace injuries**
- Workers' compensation is governed by **state statute**
- Claims must go through **state workers' compensation boards**
- Workers' compensation generally provides the **exclusive remedy for workplace injuries**
- Exclusivity exceptions **vary from state to state**



# COVID-19 & Workers' Compensation

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- Generally, workers' compensation would not apply to community-spread diseases (i.e., COVID-19)
- Workers' compensation applies to “occupational diseases” that arise “out of and in the course of employment”
  - “Occupational disease”: the disease or illness (i) arose out of and was contracted in the course and scope of employment; and (ii) arose out of or was caused by conditions particular to the work (i.e., risk of exposure greater than for general public)
  - “Arises out of”: the employer was engaged in an activity for the benefit of the employer

# State Exclusivity Exceptions

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- Many states have statutory and/or common-law exceptions to the exclusivity principle, which allow employees to bring civil lawsuits for workplace injuries and illnesses
  - North Carolina: provides exceptions for an employer's **intentional misconduct** committed with the **knowledge that such conduct is substantially certain to cause serious injury or death**
  - New York: similarly provides an exception for an employer's intentional misconduct, but the exception is **extremely narrow** (i.e., employer must have fully intended to cause the sued upon injury)
  - California: provides exception when injury is aggravated by the employer's **fraudulent concealment** of the existence of the injury and its connection with the employment

# States Expanding Workers' Compensation Coverage

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- States are amending workers' compensation statutes to **specifically list COVID-19 transmission as a covered injury** for certain high-risk medical jobs.
- Some states have enacted policies establishing a **presumption that essential workers infected with COVID-19 contracted the virus on the job**, thereby entitling them to workers' compensation.
  - California: if any “covered worker” contracts COVID-19, it is automatically “presumed” to be work-related without the employee having to provide any further proof.
- New York is not one of these states.
  - New York employees likely to obtain workers' compensation benefits **only if the nature of their employment places them at high risk of contracting the disease** (i.e., healthcare workers)

# Leave and Accommodation Claims

# Reasonable Accommodation & Non-Discrimination

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- Employees whose underlying medical conditions put them at greater risk of contracting COVID-19 **may request reasonable accommodations**
  - Employers and employees must **engage in an individualized interactive process** (similar to other accommodation requests)
  - **Potential accommodations** may include additional on-site safety measures, schedule adjustments (e.g., to minimize rush hour commuting), remote work, or a leave of absence
- Non-discrimination laws still apply (e.g., age, pregnancy)



# Potential Pitfalls to Watch Out For ...

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- **Imposing blanket rules** prohibiting employees from reporting to work based on age, disability, etc.
  - Avoid making assumptions about employees with known pre-existing medical conditions
- **Failing to recognize a request** for reasonable accommodation
- **Not keeping up** with the latest CDC and state/local guidance
  - E.g., EEOC prohibition on using antibody testing to make decisions about employees re-entering the workplace

# Sick and Family Care Leave

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- Families First Coronavirus Response Act (FFCRA)
  - Covers private employers with fewer than 500 employees and public employers
  - Two components: paid sick leave and paid emergency FMLA
- State/local coronavirus leave laws
  - New York
  - Washington, D.C.
  - Los Angeles, CA
- Existing state/local sick and family leave laws (e.g., FMLA, paid family leave laws, “mini-FMLA” laws, paid sick leave laws)
  - May provide leave for an employee’s own medical needs (including preventative care), caring for a family member with a serious health condition, needs related to a school or place of care closed due to public health emergency, etc.

# Coronavirus Leave – Best Practices

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- Consult with counsel re: which laws may apply and how the laws interact with each other (and with other leave provided by the employer)
  - E.g., running leave concurrently vs. cumulatively
- Communicate leave policies (including eligibility, notice requirements, etc.) to employees and post/distribute any applicable notices
- Maintain consistent documentation of employee leave amounts and calculation of leave pay



# What If Employees Refuse To Come to Work?

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- Generally, if employees do not qualify for leave or reasonable accommodation, employers can require employees to come to work
- However, some additional points to keep in mind:
  - **OSHA:** In limited situations, employees may refuse work if they genuinely and reasonably believe that they will be exposed to an imminent risk of death or serious physical harm and the employer failed to eliminate the danger
    - Provide PPE as required or as per CDC best practices, increase cleaning, implement social distancing, etc.
  - **NLRA:** Consider if group activity may constitute “protected concerted activity”

# Proskauer's COVID-19 Resources

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- **Coronavirus Resource Center**
  - <https://www.proskauer.com/market-solutions/coronavirus-covid-19-resource-center>
- **Proskauer Coronavirus Insights**
  - <https://coronavirus.proskauer.com/>
- **Law and the Workplace Blog**
  - <https://www.lawandtheworkplace.com/>



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