

Advocate Aurora Health Living Well Community

Conversation Three-Part Series

Part 2: Legal Liability in Re-Opening

FAQs, Based Upon Information Provided During the Webinar**

Q1: Can I be sued if there is a claim that a person got COVID-19 at my place of business?

A: Yes, there can be potential for exposure to liability for organizations, businesses and places of worship. One can never really be safe from a lawsuit. However, by following state and federal guidelines, as well as industry standards, organizations may reduce their risks.

Q2: What are your recommendations related to insurance coverage?

A: Owners and/or managers of organizations are advised to contact their insurance brokers to review current coverage and ask questions about liability if guests claim that they contracted COVID-19 due to negligence on the part of the organization. There are a variety of types of insurance coverage, with different exclusions and exceptions. It is suggested you review your policy with your insurance broker and discuss the different situations that may arise.

Q3: If I have an establishment open to the public, what type of insurance should I have, or is there anything I should be looking at within my insurance that could potentially cover a pandemic?

A: A business owner should consult their insurance broker for more information. However, coverages you may want to consider are Employment Practices Liability (EPL), business interruption, additional liability options related to the pandemic if available, and any other possible coverage that may help protect you and your business.

Q4: In the event of a risk event, who should be the one contacting the insurance agent to make a claim?

A: It depends on the size of the business. If it's a smaller organization then it will probably be the owner. If it's a larger organization or non-profit, then it may be someone else. But whoever has the relationship with the insurance agent should be the one to engage the agent around any issues or questions of coverage. If it is a risk claim, there should be no delay in reaching out to your insurance company.

Q5: Is business interruption insurance applicable to a 501c3?

A: In general, business interruption insurance is for commercial enterprises, but it is my understanding that this sort of coverage is also available for non-profits.

Q6: When Stay at Home orders are lifted, are businesses required to re-open?

A: Businesses are not required to re-open but lifting of the orders will give businesses an ability to re-open provided they follow any new guidelines. It is important that everyone understands and abides by their local jurisdictional rules, as different counties are now operating differently from Milwaukee County.

Q7: Can you elaborate on what should be included on postings in businesses and should there be something different posted in places of worship?

A: Your postings should really be based on Center for Disease Control (CDC) guidelines. The CDC currently recommends hand washing, social distancing, and wearing a mask when you're in close proximity with others. Private establishments may require everyone to wear masks, and limit access to building. However, these requirements should be posted and enforced in a non-discriminatory fashion.

Q8: Are there other ways places of business should post the new rules for their establishment?

A: Certainly; establishments could send out mailings, emails, or post online about their organizational changes due to COVID-19. For example, a place of worship might communicate the new rules of engagement, as well as any changes to operations, via a mailing to their members.

Q9: If an entity is going to require face masks for anyone who enters the premise, would it be important for the entity to have a sign at the door for people to see before they come in?

A: Having a sign would be advised, even if it is not be a legal requirement, so that everyone is clear about the rules of engagement. It is important that such rules be enforced in an even-handed fashion, so that no one is singled out for discriminatory reasons.

Q10: Do employers have a duty to provide masks and other protective gear to employees?

A: It is a clear requirement if there is a high degree of exposure to COVID-19, for example in hospital settings. However, even if it is not a legal requirement for you to provide masks to employees, from a commonsense perspective you may want to consider investing in some protection to help employees feel safe at work. Additionally, if your business is client or customer-facing, by giving your employees masks you may help the customers feel safer in your establishment.

Q11: May business owners ask employees about their health and if so, to what extent can they ask for personal information?

A: The Equal Employment Opportunity Commission (EEOC) has always taken a dim view on employers delving into health-related information, but more so in cases before someone is made an offer for employment. However, considering the pandemic and based on the information we have seen to date, the EEOC has been allowing employers to ask employees questions regarding symptoms and other factors that may be related to COVID-19 exposure. If employers are asking these

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questions, they must ensure they are keeping the information confidential by not disclosing an employee's identity. That said, if an employer becomes aware an employee has been infected or exposed, the employer may share general information to notify other employees of the possible exposure. This then allows the other employees to monitor themselves for symptoms.

Q12: Can employers request employees to return to an office space even though those workers can do their work remotely? What are the boundaries to be legally proactive as an employer?

A: Once the order is lifted, businesses are free to re-open and ask their employees to return to the office. As you think about what's best for your business or organization, bear in mind that there are a variety of employment-law issues with some employees working from home, as well as some non-employment law related issues about people working. (For example, in the legal business we deal with confidential information of clients, you'll want to make sure employees are all taking the necessary precautions to protect the confidential information.)

Q13: Is there a difference between Shelter in Place and Safer at Home?

A: No there is no difference, the two terms are being used interchangeably.

Q14: Are there fines for breaking the capacity limits or not enforcing the Safer at Home order as businesses start to think about bringing employees back and restaurants start to re-open?

A: In the City of Milwaukee, the Health Commissioner issued an order, that is still in effect. The City Council authorized citations and fines to be issued for those who violate the order, but it's not a criminal offense. All business owners should pay close attention to the restrictions about re-opening, as in many places these orders have not been completely relaxed.

Q15: Does a person have a case against a business or place of worship for not being allowed in or turned away for refusing to wear a mask?

A: Private businesses are within their rights to have policies such as requiring face masks, and currently requiring face masks is consistent with CDC recommendation (and, therefore, advised). If you are an employer and have an employee who resists the new policy, it would be in your best interest to have a discussion with the employee to document and demonstrate you tried to address their concern before letting them go. Here again, take care to enforce your requirements in a non-discriminatory fashion.

Q16: Is there a way to require people to certify their COVID-19 status?

A: Enforcement would be challenging due to testing limitations. Among other things, someone might be negative at one time and shortly thereafter contract COVID-19.

Q17: Can non-public workplaces, such as manufacturing facilities, require all persons entering to certify their COVID-19 symptoms and exposure based on personal knowledge and awareness (employees, visitors, contractors, etc.)?

A: Yes, during this time an inquiry about recent travels, symptoms and exposure to COVID-19 is very acceptable provided the policy is being enforced in a non-discriminatory manner.

Q18: Would asking about a person's COVID-19 symptoms or exposure violate HIPAA? If so, what are your recommendations?

A: No, these questions are more of a screening question as people enter the building so they would not violate HIPAA. Also, only health care entities are subject to HIPAA. However, if a business becomes aware of an exposure, then the business has a duty to keep that person's information confidential while informing others about the exposure.

Q19: With the proper signage and notice in place, should we still be concerned about increasing our insurance coverage during this time?

A: We know the risk of getting sued is out there. As a business owner it is the prudent thing to at least assess your insurance coverage with your broker and talk with your attorney about the possibility of needing legal defense, should any claims arise.

Q20: Should I ask certain questions if it looks like my company or a business isn't doing anything about COVID-19?

A: Yes. It is appropriate to speak with management about safe reopening practices. In fact, an employee's actions in doing so may be deemed protected activity under the law.

Q21: For employers, wouldn't liability be limited by workers comp, just like any other work-related injury or illness?

A: Yes, the worker's exclusivity doctrine would likely bar a lawsuit by an employee, but it would not prevent lawsuits by customers, independent contractors, and certain other third parties.

Q22: Would a claim be considered a workman's comp claim, personal injury, or under general liability?

A: It would depend on who is asserting the claim, the type of claim being asserted, and the target of the claim.

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Q23: Isn't this same risk out there for conventional influenza during flu season?

A: Speaking of legal risks, as opposed to medical risks, simply as a matter of scale, the potential for lawsuits due to exposures to COVID-19 seems more likely than the potential for lawsuits due to exposure to conventional influenza. From a medical risk, the risk is higher with the novel coronavirus. This pathogen is significantly more contagious than the flu, which is why social distancing, frequent hand washing, high touchpoint disinfecting and wearing a mask is needed.

***These FAQs have been developed from the Living Well Community Conversation recorded on May 20, 2020. The information provided by professionals who participated in that conversation does not constitute legal or medical advice. Likewise, the information provided here does not constitute legal or medical advice. AAH encourages everyone to monitor publicly available information and to always follow federal, state and local health organization guidance and government mandates.*