

SMITH DOLLAR
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Employment Law Notes



*From the desk of Diane, Justin, and Glenn
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CORONAVIRUS UPDATES FOR BUILDING CONTRACTORS

Dear Colleagues and Clients: Many of our construction clients are still conducting business as they have been deemed “essential” both under Governor Newsom’s Executive Order and Sonoma County’s Order. While this designation of “essential” may enable companies to somewhat weather this unprecedented storm, it does raise additional issues regarding the safety of these essential workers and an employer’s obligation to provide a safe workplace. Below are answers to some frequently asked questions we have been fielding.

This update provides general information and is not intended to and may not be relied upon as legal advice. Every employer’s situation is different and there are other laws and facts which may affect your own legal obligations under these orders. If you have questions regarding the application of this law to your specific situation or business, you should consult with qualified legal counsel.

FAQ

Q. One of my employees tested positive for the coronavirus and I think he was exposed on a residential repair job. I know that the homeowner was self-isolating with symptoms of Covid-19. Am I liable for this?

A. First, if he did in fact contract the virus at work, it’s likely he would be eligible for workers compensation benefits. However, if you had knowledge that the homeowner was self-isolating, and you still assigned him to that job, you may be liable for additional penalties for a serious and willful claim at the Workers Compensation Appeals Board (WCAB) and Cal-OSHA citations. Further, if the court found that you fraudulently concealed that information from your employee, you may be subject to civil liability. If you had no knowledge of the homeowner’s self-isolation before you assigned the employee to the job, and you have implemented safe work practices, or if there is no connection between his positive test and work, then there probably is no liability.

Q. Am I liable to my customers if they contract Covid-19 from one of my crew members?

A. First, in order to be liable to a third party under a negligence theory, the customer would have to prove that you failed to act as a reasonable person would, and that failure caused them harm (i.e., contracting the virus). The threshold question is would a reasonable person have acted in the manner you did? This is fact specific—certainly, if you knew your employee tested positive or had symptoms, and you still permitted them to work, you may have liability. But other than that fact scenario, the question then becomes whether it's reasonable for a business or industry designated as essential to continue operations. The answer is probably yes, so long as Covid-19 precautions are implemented.

Further, in order to prove negligence, the customer would also have to show causation. Unless there was some evidence to show that the customer contracted the virus from your employee their claim would likely fail as it may be difficult to prove how a specific person contracted the virus due to community spread.

Q. Would I be liable to my other employees under either of these two scenarios?

A. If your employee contracted the virus from a co-worker or a customer, it's likely he or she would be eligible for workers compensation benefits. However, once again, if you had knowledge, and did nothing with that information, or if you have not implemented safe work practices, then you may be liable for a serious and willful claim at the WCAB, Cal-OSHA citations, and potential civil liability.

Q. My foreman wants to shelter-in-place, but I need him here. Can I force him to come to work or discipline him for refusing to work?

A. Legally, perhaps, but the better practice is not to. Under Cal-OSHA, employees have the right to refuse hazardous work. Depending on what safety precautions you have put into place regarding Covid-19, your employee may or may not have a valid reason to refuse to work. Further, the existing California sick leave policy is very broad in its use, and a shelter-in-place order may fall within those provisions.

Q. In addition to liability from employees and customers, what other type of liability may I be exposed to as an essential business that remains in operation?

A. Cal-OSHA is currently being inundated with complaints and questions about workplace safety and Covid-19 precautions, and at some point, they may start issuing complaint notification letters. Employers have a duty to provide a safe work place to their employees, and practices must be implemented to protect workers from Coronavirus. Cal-OSHA has posted guidance at <https://www.dir.ca.gov/dosh/coronavirus/Health-Care-General-Industry.html>

There may also be potential liability under the National Labor Relations Act (NLRA). Some employees working in essential businesses who are worried they could be exposed to the virus may wish to shelter-in-place and may encourage other employees to do the same. This may leave an employer shorthanded with no crew. However, under the NLRA, this encouragement is probably considered protected concerted

action, and an employer cannot impose discipline or retaliate.

Finally, if you are not truly an “essential business”, you and your employees may be criminally cited for violation of the Sonoma County Order and Governor Newsom’s Executive Order. It’s too soon to tell how these orders will be enforced, but it is likely that there may be constitutional challenges.

As this is an evolving situation, we cannot anticipate all actions and situations that may create liability and you should consult with legal counsel if you have questions regarding these or other situations that concern you.

Q. How can my business minimize any potential liability?

- A.** Probably one of the two best ways to minimize the liabilities described above is not to require (or discipline) employees if they choose to shelter-in-place. The other way is to implement and communicate to your employees safe practices as recommended by Cal-OSHA, and to enforce those practices. Make sure to give your employees constant reminders. Hang signs throughout the office and at the jobsite, especially in food service, rest room, and common areas, reminding employees to wash their hands frequently and cover their faces while sneezing and coughing. Urge your employees who aren’t feeling well to stay home and seek medical attention. Employees may also have their own ideas and recommendations to reduce the potential spread of Covid-19 and you should solicit such advice. Finally, speak with your insurance broker regarding potential Covid-19 coverage, and make sure your business insurance policies are up to date.

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