

It's the End of the World, But First We're Getting Sued

Along with panic buying [toilet paper](#), [hand sanitizer](#), and [hand soap](#), mocking the COVID-19 or “Wuhan” Coronavirus has become something of a pastime of mine. Efforts to cash in on the bad news are not limited to [investments](#), [snake oil](#), and [hoarding food](#), we're also seeing [CNN podcasts](#) and [continuing legal education seminars](#) on the subject. Not wanting to make light of what could be a very serious situation – [eventually](#) – I found myself wondering how this might actually affect firm clients. Here are some cheery thoughts on the subject:

The Plaintiff Lottery

The lawsuits have already started. [Walmart is being sued for the death of an employee from COVID-19](#). [One woman has sued claiming she was terminated after being sent home to quarantine for 14 days](#). Here's one over [employees seeking hazard pay](#), and [another just generally blaming China](#). [Businesses are already suing their insurers over their losses](#). Ignoring the merits of any of these, a viable claim is not a prerequisite to the filing of a lawsuit.

Workers' Compensation?

Could a [pandemic](#) be considered compensable under workers' compensation?

In a [very, very recent case](#) the VA Court of appeals affirmed the Virginia Workers' Compensation Commission in a case where spider bites in the workplace were found to be compensable. Part of the standard that has always been considered for compensability asks whether the condition or injury “arises out of” employment as a result of some risk particular to the employment. Quoting the opinion: “A claimant can prove actual risk by showing employment conditions create ‘an enhanced risk’ of injury.’ ‘A workplace condition that ‘increase[s] the risk of injury’ implicates the actual risk test.” In the spider bite case the evidence showed that work being done in a boiler room nearby had caused spiders to move around, and that many spiders had been seen in the general vicinity recently. Again quoting the opinion: “... the evidence established both a physical and temporal proximity between a peculiar or unusual workplace condition (i.e., construction causing a proliferation of spiders in an office suite where they were not usually found) and claimant’s spider-bite injury. Accordingly, claimant proved the necessary ‘critical link.’”

Does exposure to a pandemic as a result of a job that requires frequent travel – [like trucking](#) - qualify? What about frequent [air travel](#)? How about forward-facing customer contact positions, like [cashiers](#), [wait staff](#), etc? I won't venture an answer here except to say that it's probably fact-specific, and [I'm not the only one to wonder](#).

OSHA and FMLA?

[Federal OSHA](#) and the [US Department of Labor](#) already have web pages offering guidance on the effect of COVID-19 in the workplace, relating not only to OSHA, but also to the Fair Labor Standards Act and Family and Medical Leave Act.

OSHA identifies as those with exposure risk: Healthcare workers, Deathcare workers (that's cheerful), Airline operations, Waste management, and those who travel to areas "where the virus is spreading." You know, like [New York](#) and [Virginia](#)... [One concern under the FLSA is the use of volunteers](#), in case "your business has a shortage of workers and is looking to 'volunteers' to help out" (probably illegal, by the way. Pay your workers.). While the [page relating to FMLA is titled "pandemic" and refers primarily to flu](#), it reminds that:

Covered employers must abide by the FMLA as well as any applicable state FMLA laws. An employee who is sick, or whose family members are sick, may be entitled to leave under the FMLA. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons which may include the flu where complications arise that create a 'serious health condition' as defined by the FMLA.

Not all employees are entitled to FMLA leave, and not all employers are required to follow it, but that's probably worth looking into if your business is facing a pandemic.

Force Majeure (Act of God)?

Oddly, this might be the most important possible impact of a significant epidemiological outbreak. Limiting my thoughts to Virginia caselaw, though the issue is obviously broader:

Most contracts, whether they be for construction, or performance, or delivery or whatever have a "force majeure" or "act of God" clause. With varying language, these contracts excuse performance in the event of some event outside the control of the parties that renders performance effectively impossible. The best written of these will carefully define where it applies, and such clauses are generally enforceable under Virginia law where they are "clear and unambiguous." Unless excluded, acts of government, such as, say, travel restrictions, quarantines, etc. may constitute force majeure.

Most notably, force majeure may be sword and shield – used offensively or defensively. [If you can't haul cargo up and down Route 95 because the government made it illegal](#) to prevent the spread of a plague, you may have a force majeure argument. On the other hand, [if your customer can't ship goods because they're stuck](#)

[on a boat that can't dock](#) to prevent the spread of a plague, your customer probably has a force majeure argument too. If you have a problem and your contracts don't have force majeure clauses, hope for the best and stock up on hand sanitizer.

Also, I'd like to suggest some light screen-time options. How about [Contagion](#) (2011)? [28 Days Later...](#) (2002)? [Outbreak](#) (1995) is a classic with a happy ending... Oh, and [wash your damn hands](#).

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