

COVID-19 Update –The Shifting Landscape II:

How do I continue to protect my business and my employees who are working remotely during the COVID-19 pandemic?

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Most government and private sector employers continue to operate with a significant number of employees working remotely due to the continued COVID-19 pandemic. With the current surge in newly reported cases, the likelihood is that many of these employees will continue to work remotely. Whether continued remote work by your employees stems from compliance with government issued restrictions or guidelines or as a sound risk management decision you made in order to look out for the health and wellbeing of your employees, there are a number of nagging questions that need to be thought through.

As the employer, your employee handbook or manual may already address when and how telecommuting will work and who among your employees is eligible to participate. You will need to review your current policy and ensure that you remain in compliance with the same and update the policy if existing circumstances arising out of the pandemic require additional provisions or modifications.

Risk Management Update:

From a purely risk management perspective,

there are a number of issues at play that may not have previously come across your desk, pre-COVID-19. For example:

- Do you have employees located in, or traveling to, parts of the country or your company's territory or even other company offices or plants that have documented cases of COVID-19?
- Is there some element of your work that increases the potential exposure to COVID-19 to your employees, their families, your customers and vendors?
- Do your day-to-day business operations and interactions with other parties increase the potential for your employees (customers, vendors and your employees' families) to be exposed to COVID-19?
- Where are the greatest exposures and what can be done to mitigate the risks in each scenario?

Each of the above raise issues that are unlikely to be addressed within your current risk management plan. How best to address these potential risks require conversations with your legal counsel and insurance professional to maximize or update your risk management plan.

Continued Efforts to Protect Your Employees and Your Business:

In the previous article on this topic, I pointed out

that the need to communicate clearly and often with your employees on your evolving plans to deal with COVID-19 risks and their safety in the workplace. For example:

- Be sure to tell employees NOT to come to work if they have any of the identified symptoms.
- Point employees to the CDC guidelines with respect to measures that employees can take to remain safe both at home and in the workplace, and help your employees identify those who may be at higher risk of contracting the virus.
- Advise them in no uncertain terms that they must remain at home if they evidence COVID-19 symptoms and that coming to work while showing symptoms may expose their fellow workers to the virus. In some jurisdictions, this may be required by law.
- If the employee discloses that he or she is experiencing undiagnosed symptoms of COVID-19 or has been exposed to someone who has the virus, they should be sent home promptly.
- As an employer, you should take appropriate steps to determine who they have been in close proximity to within the workplace over the previous 14 days and let these people know of the possible exposure. However, and this is very important, do NOT identify the employee to whom they may have been exposed due to confidentiality requirements imposed under federal law. In such a case, the employer may wish to send the potentially exposed employee home for 14 days.
- Keep your employees informed of pre-existing and newly instituted health safety measures you are taking in the workplace and what is expected of them while at work with respect to the same. Among these measures should be your

continued workplace cleaning efforts, particularly in areas of high density or high traffic; reminding employees to endeavor to maintain social distance (6 feet) and even increase the space between workstations or desks; providing remote work options; use of face masks and/or gloves in the workplace; updating and enforcing visitor or invitee policies; and addressing all non-essential business travel.

Regular communication and reinforcement of the above to your employees represents a sound loss prevention measure that will not only promote workplace safety, but provide clear and documented evidence of your continued recognition of the risk and your good faith and reasonable efforts to prevent transmission of the disease to and from your employees while on the job.

In some jurisdictions, business owners are subject to a duty to take reasonable measures to limit customer exposure to dangerous conditions. This duty of care generally requires the business owner to identify and take steps to eliminate dangerous or hazardous conditions that may exist and to maintain the business premises in a safe condition. Among the recommended measures are:

- Informing your employees how they can reduce the spread of the virus
- Using proper building ventilation, filtration and humidity control
- Following proper hand hygiene
- Following proper respiratory hygiene
- Providing tissues or hand wipes and a place to properly dispose of them
- Encouraging your employees and customers to remain at least six feet apart while on the premises
- Actively discourage handshaking

- Engage in regular cleaning and disinfection, particularly with respect to high contact surfaces, trash removal, restroom cleaning and disinfecting
- Since the outbreak, the EEOC and the CDC have authorized employers to undertake daily readings of employees' temperatures before they are permitted to enter the workplace.

With the evolving health safety guidelines and precautions, shelter-in-place recommendations/orders, social distancing of at least six feet, wearing masks, etc., individuals who allege that they contracted COVID-19 in a particular location (i.e. your business premises) likely bear some level of responsibility. Furthermore, establishing a sufficient nexus between contracting COVID-19 and attributing the same to something you did or did not do in your workplace will remain a difficult burden for claimants to meet. The key to protecting yourself and your business will be to diligently and consistently follow accepted prevention guidelines issued by public health and government authorities.

Workers' Compensation:

It is imperative that you become familiar with the particular requirements of the worker's compensation (WC) laws that apply in the states where you have business locations or where you have employees working. One state's WC coverage for communicable disease claims may be very different from those of another.

While WC laws may vary by state, telecommuters are generally covered. If a remote employee is injured at home or while on business travel and files a claim, he or she bears the burden of proving that the "incident" occurred during business hours while performing work related duties. Therefore, it is unlikely that a remote employee who contracts COVID-19 could prove that he or she became ill because of their job. In the past, with many industries, communicable

diseases would likely not have been deemed compensable where the employee was considered at no greater risk than a member of the general public. Notwithstanding that historical take, some states have expanded access to WC coverage for COVID-19 beyond first responders and health care workers to include those employees who are categorized as "essential."

In some states, "exposure" is used to reference the actual "injury" and not the symptoms of the communicable disease. Thus, employees at risk because of the nature of their work could be covered during the quarantine/testing period, since "exposure" to the disease is what triggers the WC coverage.

Employer's Liability:

Where an employee claims that he or she contracted COVID-19 due to your negligence as the employer or if a member of the employee's family is infected by the employee and alleges that such was the case because of your negligence as the employer, either the employee or the family member, or both, may assert a claim through your Employer's Liability insurance coverage or via your general liability insurance.

One issue that you as an employer may face during the pandemic is the risk to "essential" employees who feel compelled to come to work. In a case out of Cook County, Illinois, a wrongful death action was commenced earlier this year alleging that the deceased employee contracted COVID-19 while at work and that the employer did not undertake proper workplace safety measures in response to the outbreak. The deceased employee's estate sought to avoid the exclusive remedy bar imposed by WC in order to sue the employer for negligent acts, errors or omissions that were alleged to be willful, wanton and reckless. The complaint alleged that the employer failed to properly clean the premises and work-related equipment, failed to promote and enforce social distancing guidelines, failed to provide its employees with PPE and failed

to address the expressed health concerns of employees. The matter is still pending, with the outcome likely to make very interesting reading.

General Liability Insurance Coverage:

It is recommended that employers carefully review the language of their General Liability policy. This can and should be done in consultation with your legal counsel and your company's insurance agent or broker. These GCL policies vary in terms of the language incorporated in their exclusions from coverage section that could complicate coverage decisions for you and for the carrier, for example:

Communicable Disease Exclusions: The wording within this exclusion may be different with respect to disease and infection and take a broader inclusion of COVID-19.

Fungi/Mold/Mildew/Microbe/Pathogen Exclusions: Under this exclusionary language, the wording and broad definitions may create a pathway to interpretations that include COVID-19 within the exclusion.

Expected or Intended Exclusions: While insurance companies generally have a difficult time proving expected or intended actions, this may be something the carrier tries to consider, given the circumstances of the allegations included in the claim.

Increased Risk of Cyber Attack and Data Breaches:

A great majority of IT executives are of the opinion that remote or virtual employees may not be secure working from their home networks. It is indeed a legitimate concern.

When employees work from home the threat of cyber-attacks and data breaches is greatly increased. To protect your own business interests and those of your remote workers from hacking, malware, or phishing, require these employees to:

- Access your company's applications and resources through an encrypted virtual private network (VPN)
- Have updated antivirus and firewall software installed on the computers they use remotely
- Require strong passwords and change them frequently
- Lock their computers and mobile devices when they are not working
- Know how to identify and avoid phishing attempts and other scams

You may also consider using password managers or SSO (single sign-on) software throughout your company to authenticate users and reduce vulnerabilities.

If you do not currently have cyber liability insurance coverage in place for your company, please give it serious consideration and discuss the protections that it may provide for your company in the event of a disastrous cyber-attack.

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