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Narrative

“The Impact of COVID Vaccine on Retail, Restaurant & Hospitality Industry”

The world's hopes of having perfect vision in 2020 were brought to an abrupt halt due to COVID-19. The retail, restaurant and hospitality industries tackled challenges that had never been faced in most of our lifetimes. There are many questions regarding what is legal and compliant when it comes to the COVID-19 vaccine and COVID-19 claims.

I. Employment Claims Alert: Guidance from the EEOC¹

The Equal Employment Opportunity Commission's ("EEOC") role is to enforce workplace anti-discrimination laws. Federal, state and local governments can enact additional laws and regulations for employers to follow. Previously, the EEOC created the "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" to provide guidance during the H1N1 outbreak. The publication has now been updated to include COVID-19.²

A. Mandating the COVID-19 Vaccine

Can the COVID-19 vaccine be mandated by employers? The short answer is yes. The EEOC/federal government has given employers guidance confirming that employers have authority to mandate employees receive a COVID-19 vaccine. However, the EEOC also prohibits certain actions, such as pre-employment questioning and requiring the provision of medical records. Most likely, employers should only request a receipt of the COVID-19 vaccination.

¹ The rules and guidance regarding COVID-19 rapidly evolves and changes. As of the date of this document, the EEOC's mandates were last updated on December 16, 2020. They are subject to change.

² https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

Even if an employer were to mandate a vaccination, some employees may prefer not to get the vaccination. If an employee's preference not to receive a vaccine does not fall under one of the exceptions listed below, their decision is not protected. Therefore, per the EEOC, the employer may take the necessary disciplinary action against that individual without making any reasonable accommodations.

Exception: Sincerely held religious belief

Employers cannot discriminate on the basis of religion under Title VII of the Civil Rights Act. If the employee has a "sincerely held religious belief," the employee would not be required to get the COVID-19 vaccine. In these circumstances, the employer must make reasonable accommodations for the employee. Satisfying the "reasonable accommodation" requirement will vary depending on the individual's position. Some examples could be adjusting the employees work location, requiring a mask, or changing the employee's duties. If a reasonable accommodation cannot be provided without the employer suffering undue hardship, the law does not require an accommodation.

Exception: Disability

Employers cannot discriminate if the employee has a disability that prevents receiving the vaccine under the Americans with Disabilities Act (ADA). If such a disability exists, the employer cannot terminate the employee or remove them from the workplace without providing reasonable accommodations. 29 C.F.R. 1630.2. However, a reasonable accommodation does not have to be provided if it will cause undue hardship or if the employee is a "direct threat" to the safety and health of the workplace.

B. Option to "Strongly Encourage"

Rather than mandating a vaccine and navigating the potential claims that could arise from such a requirement, employers can consider encouraging and incentivizing COVID-19 vaccines. For example, offer paid time off to obtain the vaccine, pay for the vaccine, or provide incentives to get vaccinated. Encouraging vaccination in lieu of a mandate will allow employers to avoid some of the legal pitfalls that could arise from a mandate.

C. Opening the door to claims

In addition to discrimination allegations, there is a potential for workers' compensation type allegations claiming bodily injury/sickness as a result of the vaccine. For example, if an employer mandates the vaccine to maintain employment and negative side effects result, in many states, there is a strong argument for employees to assert a workers' compensation claim. In situations where the vaccine is simply encouraged, the future results of such claims are not as clear.

II. COVID-19 Transmission Related Claims

1. Type of Claims

Many of the COVID-19 related claims and litigation that have made headlines have been with regard to insurance disputes on coverage. However, we are seeing some liability (usually negligence allegations) related claims and litigation. As the number of people being vaccinated grows, stay-at-home orders, regulations on large gatherings, limitations in on inperson dining, etc. will continue to relax, which may also increase claims. In the grand scheme of things, for most states, we have only made it halfway through the statute of limitations for the potential avalanche of litigation in this area originating from the start of the pandemic.

In most jurisdictions, to successfully bring a negligence claim, a plaintiff must prove that the defendant owed the plaintiff a duty of care, the defendant breached that duty, the plaintiff sustained an injury, and the defendant's breach caused the plaintiff's injury.

2. Protections Available

To receive guidance on how to handle future claims, it is important to know the trends and laws that have been enacted on the federal and state level.

Federal Level Protections

COVID-19 was declared an emergency under the Public Readiness and Emergency Preparedness ("PREP") Act on March 10, 2020. Currently, Federal law provides a shield against liability under certain circumstances pertaining to COVID-19 vaccinations under the Public Readiness and Emergency Preparedness ("PREP") Act. The immunity under the PREP Act extends to wrongful death, personal injury, emotional injury, property damage, business interruption and fear of personal injury. It does not protect against grossly negligent conduct.

The PREP Act will not apply to all businesses. It only applies to certain "covered entities." Some of the covered entities include manufacturers of countermeasures, distributors of countermeasures, and certain healthcare providers.

State Level Protections

Many states have enacted COVID-19 limited liability shield laws. For many companies in the retail, restaurant and hospitality industries, the protections on the state and local levels can provide protection against liability when the company does not fall into the category of a covered entity under the PREP Act. The states that have passed COVID-19 limited immunity laws are creating higher standards for those who file lawsuits seeking compensation for COVID-19 transmission related injuries to recover damages. However, it is important to recognize that most of these protections are against civil, negligence claims and do not preclude all types of actions related to COVID-19.

Examples of the types of laws enacted on the state level are as follows:

Georgia enacted a law in response to COVID-19 on August 5, 2020. The law generally shields businesses against liability if there is no gross negligence, willful and wanton misconduct or reckless or intentional disregard to exposing someone to COVID-19. ." O.C.G.A. § 51-16-2. The law also provides specific requirements for a written warning that businesses can post to create a rebuttable presumption that potential the plaintiff assumed the risk of being exposed or contracting COVID-19. The warning is required at the entrance of the business or on any receipt/proof of purchase for entry such as a ticket or wristband. O.C.G.A. § 51-16-3.

Indiana enacted a civil tort immunity law on February 18, 2021 to protect businesses from lawsuits alleging damages arising from coronavirus injuries to employees, customers or others on their property. (Indiana-2021-SB0001) In addition, companies that manufacture COVID-19 protection products are afforded limited civil immunity under the law. Like other states, the law does not protect a business against actions that are grossly negligent or willful or wanton misconduct (including fraud and intentionally tortious acts). In addition, Indiana's law excludes claims brought by employees under Indiana's Occupational Safety and Health Act, and employees can still bring claims through Indiana's Workers' Compensation Board.

Montana enacted a statute to help establish standards for imposing liability and provide defenses for COVID-19 related claims. (SB 65) For a premises owner, Montana's statute essentially requires a showing of gross negligence, willful and wanton misconduct or an intentional tort in order for there to be liability for civil damages for injuries or death sustained from an individual's exposure to COVID-19.

Importantly, Montana also laid out an affirmative defense available for such claims. The affirmative defense is that "the person took reasonable measures consistent

with a federal or state statute, regulation, order or public health guidance related to COVID-19 that was applicable to the person or activity at issue at the time of the alleged injury, death or property damage." If the affirmative defense can be proven, it is a complete bar to any action relating to COVID-19.

Nevada's governor touted his state as the "first in the nation" to protect those in the hospitality industry from COVID-19 related injury and wrongful death lawsuits. Nevada enacted S.B. 4 to protect premises owners until July 1, 2023 or the end of the state's COVID-19 health emergency (whichever is later) from liability for COVID-19 related injury or death unless the plaintiff proves the defendant was grossly negligent as shown by violating state health official guidelines.

North Carolina provides limited immunity to some businesses against COVID-19 transmission claims. (N.C. 95-129(1)). Like Montana, unless the business was grossly negligent or acted intentionally, the immunity protection will likely apply. (Session Law 2020-89 or House Bill 118, effective July 2, 2020).

Ohio's H.B. 606 went into effect on December 13, 2020. Ohio's law protects businesses, individuals, schools and health care providers from liability for COVID-19 injury and death claims unless the plaintiff proves reckless conduct, intentional misconduct or willful or wanton conduct. The law covers conduct between March 9, 2020 and September 30, 2021.

III. COVID-19 Claims: Recommendations to Mitigate Liability and Real Life Examples

A. Practical Ways to Mitigate Exposure for COVID-19 Liability

To combat against COVID-19 claims, it will be important for the retail, restaurant and hospitality industry to keep up with and follow the guidance outlined on the national and state level to prevent the spread of COVID-19. In addition, businesses should be documenting the COVID-19 policies in place. Creating policies and procedures and following such policies and procedures will be of utmost importance. As shown in the above state limited liability law examples, one of the keys to defending liability claims related to the transmission of COVID-19 is going to be the measures enacted by the company to comply with CDC and other federal and local public health guidance recommendations. Even in those states that have not passed COVID-19 immunity laws to protect the retail, hospitality and restaurant industries, companies can still make a practical argument that they complied with the recommendations from state and federal health authorities to protect employees and customers from COVID-19 transmission.

Another measure companies can consider is the requirement of COVID-19 liability waivers, which come with their own set of risks and benefits. The enforceability of such waivers will vary by state. However, inclusion of a liability waiver clause in contracts, participation forms, reservation waivers, etc. could be used as an additional protection against liability if they are upheld by the Court. As with all waivers, the language should clearly and conspicuously identify the future claims that the consumer is waiving. Businesses can also consider including indemnification language and covenants not to sue. In addition, to waiving liability, such forms could be used to include language requiring the customer to expressly acknowledge the inherent risk of contracting COVID-19 that is associated with being on the property of the business for use in support of a potential assumption of the risk defense.

B. COVID-19 Litigation Examples

Gutierrez v. Publix, case number 2020-025168-CA-01, in the Circuit Court for the Eleventh Judicial Circuit of Florida

The family of a Publix employee filed a lawsuit after the employee allegedly caught COVID-19 from a co-worker and died from complications caused by the virus. The family alleges Publix breached its duty to keep employees safe by failing to take proper precautions and prohibiting employees from wearing PPE. Counsel for Publix filed a Motion to Dismiss on the grounds that the action should be filed in the Florida Division of Administrative Hearings as a workers' compensation claim. The Judge denied the Motion to Dismiss, which will allow the case to proceed outside of the workers' compensation laws of Florida. This case is still pending.

Ferdinand Benjamin v. JBS SA, et al., Case No. 200500370, in the Philadelphia Court of Common Pleas

The plaintiff alleges that his father, an employee at a meat processing plant, died of COVID-19 related complications. The plaintiff argues that his father contracted COVID-19 after being exposed to the virus at work. The plaintiff is arguing that the defendant owed its employees a duty to provide a safe working environment. Some of the alleged breach of duty claims are that the employer failed to provide employees with personal protective equipment, failed to enforce social distancing guidelines and failed to sanitize its facilities. Because of these breaches, the plaintiff is claiming his father became infected with COVID-19 and ultimately died. This case is still pending.

Tony Evans, Special Administrator of the Estate of Wando Evans, Deceased v. Wal-Mart, Inc., et al., Case No. 2020L003938, Circuit Court of Cook County, IL, April 6, 2020

This is a wrongful death claim where the plaintiff alleges Walmart knew several of its employees were exhibiting COVID-19 symptoms, but it did not do anything in response. This is the type of claim that businesses could likely see from employees and customers alike. From the employee standpoint, in most states, employers will likely argue that the workers' compensation statutes should apply. One big requirement that plaintiffs under any jurisdiction will have to prove is that the infection took place at a particular location. This case is still pending.