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Narrative

### Physical Security in a COVID Age

#### I. The Essential Elements of a Negligent Security Claim Raised by a Customer?

##### A. Is there any evidence of foreseeable injury?

A business owner does not have a duty to insure from all injuries on the premises including the public's safety from violent attack. (Ann M v. Pacific Plaza Shopping Center (1993) 666 Cal.4th 679). A business owes no duty of care to victims of third party crimes from any patron, including a Covid-denier, unless there is proof of the element of foreseeability. CACI 1005, in fact, provides that a business owner is not liable for third party crime in circumstances where the business owner "cannot reasonably anticipate such conduct." A business owner owes a special duty of care to victims of third party violent crimes if the Plaintiff can establish through admissible evidence that: (1) the business owner knew of prior criminal acts on his property; (2) the business owner was in a geographic location known for high crime or Covid-positivity; and (3) there were prior crimes or Covid-Outbreaks that took place. See, e.g., Delgado v. Trax Bar & Grill (2005) 36 Cal. 4<sup>th</sup> 224, 240 (prior assaults); Alvarez v. Jacmar Pacific Pizza Corp. (2002) 100 Cal. App. 4<sup>th</sup> 1190, 1212). The requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violence or Covid-infection on the premises." (Id.) Absent foreseeability of the particular conduct, there is no duty to protect the plaintiff from that particular type of harm." (Alvarez (2002) 100 Cal. App. 4<sup>th</sup> 1190, 1212.)

##### B. Is there any evidence of notice?

A duty of care to third party crime victims may also be imposed where the "defendant failed to act despite **actual notice** that [a] particular dangerous assailant [or condition] was on the premises." Saelzler v. Advanced Group, 25 Cal. 4<sup>th</sup> at 779). For example, in Mata v. Mata (2003) 105 Cal. App. 4<sup>th</sup> 1121, 1129, the Court held there were triable issues of fact regarding whether a breach of duty occurred in a case where a tavern owner's employee ejected a violent customer, failed to call 9-1-1, failed to check for weapons, and the customer had a known history of violence and was actually engaging in threatening behavior.

Where a Covid-denier engages in threatening behavior and the situation cannot be diffused, an employee should tell the customer to leave and, if he or she continues to be hostile, call 9-1-1. The decision to eject a customer is a difficult one that gives rise to inherent risk of a personal injury lawsuit. The decision to eject the customer from the premises should always be made by management and without causing physical injury. It should be a decision of law resort. We have seen many cases where customers sit on the ground and refuses to leave. There are many suggestions in the Playbook to negotiate with the Covid-denier to diffuse any potential for violence. This situation presents a dilemma of protecting the customers and the employees in the Store, without causing physical harm to the customer. If a lawsuit is filed, there is a strong argument that the Plaintiff caused his or her own injuries by refusing to leave the premises. Each state has a shopkeeper privilege that may protecting the premises owners. It is important to know the parameter of the privilege in the state in which the claims arises.

### **C. Is there any evidence of causation?**

The Courts require that there be a **causal link** between the Premise's owner's security measures and the third party crime from the Covid-denier. For example, the California Supreme Court held that an apartment owner could not be liable for its failure to provide daytime security guards and to maintain functioning locked gates without an actual causal link showing that the additional security measures identified by the plaintiff *would have actually prevented the assault on the plaintiff*. (Saelzler v. Advanced Group 400, *supra*, 25 Cal. 4th 770, 775-77). The Court found that the plaintiff's argument that increased security might have prevented the harm was *speculative*. (*Id.* at 777.) The court reiterated the importance of considering the landowner's practical ability to prevent the harm stating that:

“When an injury can be prevented by a lock or a fence or a chain across a driveway or some other physical device, a landowner's failure to erect an appropriate barrier can be the legal cause of an injury inflicted by the negligent or criminal act of a third person. [Citations.] But where ... we are presented with an open area which could be fully protected, if at all, only by a Berlin Wall, we do not believe a landowner is the cause of a physical assault it could not reasonably have prevented (*Id.* at p. 779.)

The court recognized that its decision finding the premises owner not liable required the balancing of two important and competing concerns: “society's interest in compensating persons injured by another's negligent acts, and its reluctance to impose unrealistic financial burdens on property owners conducting legitimate business enterprises on their premises.” (*Id.* at 766.)

The situs of a Covid9 infection is inherently hard to prove. The airborne particles may be anywhere or everywhere and there have even been instances where an individual has been infected when they have not left their home. Absent an outbreak shutting down a particular premises, the evidence of causation may be tenuous or even non-existent. Where strong covid-guidelines are implemented at the Store level, the causal link for a Covid infection may be impossible to prove. Additionally, where a covid-denier assaults a third party, the premises owners is not responsible for third party conduct that it cannot control. The Store's playbook should include training for frontline works to diffuse the situations arising from Covid-deniers. A

customer refusing to leave should never be forcefully ejected from the Premises but instead, police should be contacted because the refusal to leave is a trespass. Signage should be clearly regarding the mask requirement, as well as social distancing. Frontline workers should be prepared to address allegations of exceptions to mask-wearing under the ADA.

## **II. The Essential Elements of a Negligent Security Claim Raised by an Employee**

The worker's compensation exclusivity rule provides that workers' compensation ordinarily provides the exclusive remedy for an injury sustained by an employee in the course of employment and compensable under the workers' compensation law. (Singh v. Southland Stone, U.S.A., Inc. (2010) 186 Cal.App.4th 338, 365.) The worker's compensation exclusivity rule is an affirmative defense. Where a complaint affirmatively alleges facts indicating coverage by the workers' compensation law, no civil action will lie and the complaint is subject to a general demurrer. (Doney v. Tambouratgis (1979) 23 Ca1.3d 91, 97).

The workers' compensation exclusivity rule is founded upon statute, the Workers Compensation Exclusivity Act (Labor Code § 3200 et seq.). An employee's injury is subject to the workers' compensation system if the "conditions of compensation" exist at the time of injury, namely that the employee is performing service related to and within the course of employment; subject to limited exceptions. California Lab. Code § 3600 (b). Where the conditions of compensation are met, the Act provides the "sole and exclusive remedy" of the employee, "in lieu of any other liability whatsoever." California Labor Code §§ 3600; 3602 (a).

Therefore, an employee who sustains an industrial injury "arising out of and in the course of the employment" is limited to recovery under the workers' compensation system. (Torres v. Parkhouse Tire Service, Inc. (2001) 26 Cal.4th 995, 1001). In such case, injuries caused by employer negligence or without employer fault are compensated at the normal rate under the workers' compensation system and are subject to workers' compensation exclusivity. (Arendell v. Auto Parts Club, Inc. (1994) 29 Cal.App.4th 1261, 1264).

In Nevada, the exclusivity defense extends to co-workers of the injured employee, alleged to have caused the injury within the scope of his/her employment. (lfendy v. Losse (1991) 54 Cal.3d 723, 740). "To prevent employees from circumventing the exclusivity rule by bringing lawsuits for work-related injuries against co-employees, who in turn would seek indemnity from their employers, the Legislature in 1959 provided immunity to co-employees." (Torres, at 1002). Under Labor Code § 3601 (a), where the conditions of compensation under the Act are met, workers' compensation is "the exclusive remedy for injury or death of an employee against any other employee of the employer acting within the scope of his or her employment," with delineated exceptions not applicable here. Therefore, workers' compensation was also made the exclusive remedy against fellow employees acting within the scope of employment. (Torres at 1002).

In Nevada, employers and co-employees of a person injured in the course of employment are immune from liability under the Nevada Industrial Insurance ("NIIA.") NRS 616B.612; Lipps v. S. Nev. Paving, 116 Nev. 497, 501, 998 P.2d 1183, 1186 (2000); see also NRS 616B.612 (3), NRS 616A.020 (1); NRS 616C.215(2) (a)). Additionally, the NIIA is "uniquely different from industrial insurance acts of some states, including California, in that sub-contractors and independent contractors are accorded the same status as employees and their

employers are immune from civil liability. Meers v. Houghton Elevator, 101 Nev. 283, 285, 701 P.2d 1006, 1007 (1985); see also NRS 616A.210(1) (“[S]ubcontractors, independent contractors and the employees of either [are] deemed to be employees of the principal contractor for the purposes of [the NIIA].”).

However, not all types of subcontractors and independent contractors are considered to be statutory employees under NRS 616A.210. A subcontractor or independent contractor is not a statutory employee if he “is not in the same trade, business, profession or occupation as the [employer of the injured worker].” See NRS 616B.603(1)(b); Hays Home Delivery, Inc. v. Emp'rs Ins. Co. of Nev., 117 Nev. 678, 682, 31 P.3d 367, 369–70 (2001) (finding that home delivery service was in same business as logistics company).

The “normal work” test, first articulated in Meers, guides courts as to whether a subcontractor or independent contractor is considered to be in the same trade, business, profession, or occupation as the employer of an injured worker. Hays, 117 Nev. at 682–83, 31 P.3d at 369–70). The Meers test (except in cases where the work is obviously a subcontracted fraction of a main contract) is whether that indispensable activity is, in that business, normally carried on through employees rather than independent contractors. Oliver v. Barrick Goldstrike Mines, 111 Nev. 1338, 1349, 905 P.2d 168, 175 (1995).

Each state’s statutory scheme will be different but the analysis is generally the same. The inquiry is whether the employee was injured in the course and scope of employment. Certainly an assault in the workplace from a combative covid-denier on an employee, while unfortunate, would limit the Store’s tort liability given the injury occurred in the course and scope as a matter of law. A more difficult issue arises when the Covid-denier comes into the store infected and without a mask, and then an employee subsequently tests positive. Is Covid a compensable workplace injury under the worker’s compensation statute? This issue may vary by state and some States, like California, require an employee missing work due to Covid be paid 2/3 of their salary without using leave. It is important to know the Covid rules and regulations in each state you are adjusting employee claims for Covid-infections occurring both inside and outside the store.

### **Best Practices for Retail, Food Stores, Restaurants, and Food Pick-Up/Delivery Services During the COVID-19 Pandemic**

#### **Sample Playbook for store/restaurant level: Face Covering Guidance for Customers**

- All customers waiting in line to order food, while ordering food at the cashier, or waiting to pick up food inside the store are required to wear a face covering
- Customers are allowed to remove their face covering only when they are seated at their table and must place their face coverings back on when they leave the table

#### FAQs / Customer handling playbook

- What happens if a customer comes into the store without a face covering?
  - o Politely inform the customer of the face covering policy.

- Use standard verbiage that explains to the customer why we have the policy in place and give them alternatives to purchasing our food...
- *“Hello, we are requiring customers to wear a face covering at this time as required by the State of Nevada and the CDC to prevent the spread of Covid-19. You are more than welcome to return back inside with your face covering on or you can use our drive thru services in your vehicle. Thank you for your understanding.”*
- What happens when a customer refuses to comply?
  - Empathize with the customer’s frustration but re-iterate that we are mandated by the State to comply with and enforce the face covering order and re-iterate alternatives...
  - *“I understand this is a difficult time for everyone. Unfortunately, in order for us to remain open to serve you, I ask that you please have your face covering on to keep everyone safe.”*
  - If you are able to, offer the customer a new/clean disposable face covering from our inventory to wear to encourage compliance.
  - If the customer continues to refuse to wear a face covering, politely direct them outside and to the drive thru line...
  - *“We are unfortunately unable to serve you inside the store at this time. Please feel free to use the drive thru services to place your order.”*
- What happens when a customer refuses to leave or becomes combative?
  - Advise the customer we cannot provide service and ask them to leave.
  - *“While I understand you are frustrated, we are unfortunately unable to serve you at this moment. For your safety and the safety of our staff and customers, we are going to ask you to leave for today.”*
  - If the customer still refuses to leave, defer to management discretion on how to handle. Do not further engage with the customer.
  - Managers, attempt to de-escalate the situation by taking the customer’s order and having them wait outside in their vehicle and deliver the food to them outside. The goal should always be to remove the disruptive customer from the premises as quickly and with little effort as possible.
  - However, if you feel the safety of other team members or customers are in danger, call 911 immediately

FDA is sharing information about best practices to operate retail food stores, restaurants, and associated pick-up and delivery services during the COVID-19 pandemic to safeguard workers and consumers.

This addresses key considerations for how foods offered at retail can be safely handled and delivered to the public, as well as key best practices for employee health, cleaning and sanitizing, and personal protective equipment (PPE). This is not a comprehensive list. We encourage consulting the references and links provided below by CDC, FDA, EPA, and OSHA for more detailed information. This will be updated as FDA receives further information and inquiries.

- Managing Employee Health (Including Contracted Workers)
- Personal Hygiene for Employees

- Managing Operations in a Foodservice Establishment or Retail Food Store
- Managing Food Pick-Up and Delivery

### **Managing Employee Health (Including Contracted Workers)**

- Instruct employees with symptoms associated with COVID-19 to report them to their supervisors. Instruct sick employees to stay home and to follow the CDC's What to do if you are sick with coronavirus disease 2019 (COVID-19). Consult with the local health department for additional guidance.
- If an employee is sick at work, send them home immediately. Clean and disinfect surfaces in their workspace. Others at the facility with close contact (i.e., within 6 feet) of the employee during this time should be considered exposed.
- Instruct employees who are well, but know they have been exposed to COVID-19, to notify their supervisor and follow CDC-recommended precautions (see below).
- Inform fellow employees of their possible exposure to COVID-19 in the workplace, if an employee is confirmed to have COVID-19, while maintaining confidentiality.
- Implement workplace controls to reduce transmission among employees, such as those described below that are included in CDC's Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19.
  - Employers - Pre-screen (e.g., take temperature and assess symptoms prior to starting work).
  - Employers - Disinfect and clean work spaces and equipment, and consider more frequent cleaning of high touch surfaces.
  - Employees - Regularly self-monitor (e.g., take temperature and assess symptoms of coronavirus).
  - Employees - Wear a mask or face covering.
  - Employees - Practice social distancing and stay at least 6 feet from other people whenever possible.
- For additional information when employees may have been exposed to COVID-19, refer to CDC's- CDC's Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19.
- For additional information on employee health and hygiene and recommendations to help prevent worker transmission of foodborne illness, refer to FDA's Employee Health and Personal Hygiene Handbook.
  - If FDA recommendations differ from CDC's regarding employee health and COVID-19, follow CDC.
- For returning previously sick employees to work, refer to CDC's Guidance for Discontinuation of Home Isolation for Persons with COVID-19.
- Follow CDC and FDA information on PPE (i.e., gloves, face masks/coverings, and protective gear).
- Frequently review CDC's CDC's Interim Guidance for Business and Employers to Plan and Respond to Coronavirus Disease 2019.
- Understand risk at the workplace — use OSHA's Guidance on Preparing Workplaces for COVID-19.

## Managing Operations in a Foodservice Establishment or Retail Food Store

Continue to follow established food safety protocols and best practices for retail food establishments and important COVID-19 recommendations, including the following:

- Follow the 4 key steps to food safety: Always — Clean, *Separate*, Cook, and Chill.
- Wash, rinse, and sanitize food contact surfaces dishware, utensils, food preparation surfaces, and beverage equipment after use.
- Frequently disinfect surfaces repeatedly touched by employees or customers such as door knobs, equipment handles, check-out counters, and grocery cart handles, etc.
- Frequently clean and disinfect floors, counters, and other facility access areas using EPA-registered disinfectants.
- Prepare and use sanitizers according to label instructions.
- When changing your normal food preparation procedures, service, delivery functions, or making staffing changes, apply procedures that ensure:
  - Cooked foods reach the proper internal temperatures prior to service or cooling.
  - Hot foods are cooled rapidly for later use – check temperatures of foods being cooled in refrigerators or by rapid cooling techniques such as ice baths and cooling wands.
  - The time foods being stored, displayed, or delivered are held in the danger zone (between 41°F and 135°F) is minimized.
  - Proper training for food employees with new or altered duties and that they apply the training according to established procedures.
- Help customers maintain good infection control and social distancing by:
  - Discontinuing operations, such as salad bars, buffets, and beverage service stations that require customers to use common utensils or dispensers.
  - *Finding ways to encourage spacing between customers while in line for service or check out in accordance with the applicable State or local requirements.*
  - Discouraging customers from bringing pets — *except service animals* — into stores or waiting areas.
- Continue to use sanitizers and disinfectants for their designed purposes.
- Verify that your ware-washing machines are operating at the required wash and rinse temperatures and with the appropriate detergents and sanitizers.
- Remember that hot water can be used in place of chemicals to sanitize equipment and utensils in manual ware-washing machines.

## Managing Food Pick-Up and Delivery

- Observe established food safety practices for time/temp control, preventing cross contamination, cleaning hands, no sick workers, and storage of food, etc.
- Have employees wash hands often with soap and water for at least 20 seconds, especially after going to the bathroom, before eating, after blowing their nose, coughing or sneezing, or after touching high touch surfaces, e.g., doorknobs, and doorbells.
  - If soap and water are not readily available, use an alcohol-based hand sanitizer with at least 60% alcohol. Always wash hands with soap and water if hands are visibly dirty. See CDC's How to Protect Yourself & Others.

- Increase the frequency of cleaning and disinfecting of high-touch surfaces such as counter tops and touch pads and within the vehicle, by wiping down surfaces using a regular household cleaning spray or wipe.
  - Make sure to read the label and follow manufacturer’s instructions on use.
- Establish designated pick-up zones for customers to help maintain social distancing.
- Practice social distancing when delivering food, e.g., offering “no touch” deliveries and sending text alerts or calling when deliveries have arrived.
- Conduct an evaluation of your facility to identify and apply operational changes in order to maintain social distancing if offering take-out/carry-out option by maintaining a 6-foot distance from others, when possible.
- Keep hot foods hot and cold foods cold by storing in appropriate transport vessels.
  - Keep cold foods cold by keeping enough coolant materials, e.g., gel packs.
  - Keep hot foods hot by ensuring insulated cases are properly functioning.
- Keep foods separated to avoid cross contamination, e.g., keeping raw foods separated from cooked and ready-to-eat foods.
- Ensure that any wrapping and packaging used for food transport is done so that contamination of the food is prevented.
- Routinely clean and sanitize coolers and insulated bags used to deliver foods.