Mitigating Exposure to Employee COVID-19 Illness Claims

May 26, 2020

As more workers begin to return to the workplace, it is expected that there will be an increase in the number of lawsuits related to employee contraction of the virus in the workplace. While the general rule in most states is that the workers' compensation system provides the exclusive remedy for work-related injuries and illnesses, claimants and their attorneys are eyeing exceptions to the workers' compensation system in order to maximize their potential recovery.

California

Exceptions to Workers' Compensation Exclusivity

California has three principal exceptions to the exclusive remedy provisions of workers' compensation. The exceptions are contained in Labor Code section 3602. These are: (1) [**Assault]** Where the employee's injury or death is proximately caused by a willful physical assault by the employer; (2) **[Fraudulent Concealment]** Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation; and (3) [**Dual-capacity**] Where the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration, to an independent third person, and that product is thereafter provided for the employee's use by a third person. A fourth exception is set forth under Labor Code 4558, known as the punch-press exception, which permits an employee to sue his or her employer directly where a power press machine requires a guard that was either removed or not installed, which results in an injury.

These exceptions are construed narrowly. The fraudulent concealment exception has primarily been used in the toxic tort context, but it still requires an employee to present the difficult proof that an employer knew an employee was ill, and concealed it from an employee who did not know he was ill. *Davis v. Lockheed Corp.* (1993) 13 Cal.App.4th 519; *Foster v. Zerox Corp.* (1985) 180 Cal.App.3d 293. Similarly, the dual-capacity doctrine carves out the unusual scenario in which an employee is injured by a product sold and manufactured by his or her employer, provided to him or her by a third party, and where the injury was not suffered while in the course and scope of employment. *Behrens v. Fayette Mfg., Co* (1992) 4 Cal. App.4th 1567.

The fraudulent concealment exception does present at least the potential that it might apply in situations involving an employee contracting COVID-19 in the workplace, assuming for example that the employer knew that those working in close proximity had already contracted the virus. Even this presents difficult proof hurdles

for the employee to show aggravation of an existing illness, as well as the employer's knowledge that the employee had the illness.

Governor Newsome's Executive Order Regarding Workers' Compensation Applicability to COVID-19

On May 6, 2020, Governor Newsome issued the latest in a series of Executive Orders relating to the COVID-19 pandemic, establishing a rebuttable, temporary legal presumption that certain cases of COVID-19 arise out of and occur in the course of employment for purposes of workers' compensation coverage.

The presumption is time-limited in that the order applies the presumption to claims occurring from March 19, 2020 until 60 days after the issuance of the order (July 5, 2020). The presumption of workers' compensation coverage is rebuttable, which means that an employer can provide evidence that the employee's exposure to COVID-19 did not arise out of the course and scope of employment. The rebuttable presumption still shifts the burden of proof from the employee to the employer, which means that it is no longer the employee's burden to prove that their work caused their illness.

The order grants the presumption to any employee who is diagnosed or tests positive for COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment. The presumption does not apply to employees who worked only at home.

The order's stated purpose is to "reduce the spread of COVID-19 by providing access to prompt and efficient treatment." The order has the effect of allocating the cost of treatment for COVID-19 to workers' compensation insurers, whereas if employees retained their normal burden of proof under Labor Code 3600, it would often be difficult or impossible to establish the location from which an employee was exposed to COVID-19, and therefore difficult to obtain coverage by the carrier.

In some sense, the order is positive for employers. Although multiple cases of COVID-19 presumed to be in the workplace will cause their insurance premiums to rise, it should eliminate the costs of fighting direct lawsuits which might otherwise be brought, attempting to utilize the fraudulent concealment exception, for example, to workers' compensation coverage. The costs for claims will be covered by the insurers.

Oregon

While the general rule in Oregon is that workers' compensation is the exclusive remedy for workplace injuries and illnesses, *see* ORS 656.018, Oregon has two main exceptions. First, "[a]n injured worker may pursue a civil negligence action for a work-related injury that has been determined to be not compensable because the worker has failed to establish that a work-related incident was the major contributing cause of the worker's injury only after an order determining that the claim is not compensable has become final." ORS 656.019. For example, in *Bundy v. NuStar GP, LLC*, 362 Or. 282, 407 P.3d 801 (2017), the Oregon Supreme Court reversed and remanded

the trial court's dismissal of a worker's negligence claim where the worker was unable to prove that his exposure to gasoline vapors at work was the major contributing cause of his somatoform disorders.

Oregon also has an exception for injuries that are the "deliberate intention" of the employer. *See* ORS 656.156. The Oregon Supreme Court has interpreted this phrase as requiring that "the employer must have determined to injure an employee and used some means appropriate to that end; that there must be a specific intent, and not merely carelessness or negligence, however gross." *Kilminster v. Day Mgmt. Corp.*, 323 Or. 618, 630, 919 P.2d 474 (1996) (quoting *Jenkins v. Carman Mfg. Co.*, 79 Or. 448, 453–54, 155 P. 703 (1916)). "[A] specific intent to produce an injury may be inferred from the circumstances." *Id.* at 633. "In other words, the facts must support a reasonable inference that the employer 'wished to injure' the worker." *Miller v. Goodyear Tire & Rubber Co.*, No. 3:19-CV-01375-IM, 2020 WL 265198, at *3 (D. Or. Jan. 18, 2020) (quoting *Kilminster*, 323 Or. at 633).

Depending on the factual circumstances, either of these exceptions could apply to a worker's alleged contraction of COVID-19 in the workplace.

Washington

Washington, like Oregon, has a statute that declares that the workers' compensation system is the exclusive remedy for workplace injuries and illnesses. *See* RCW 51.04.010. However, Washington also has an exception for injuries that result from the "deliberate intention" of the employer. *See* RCW 51.24.020. This exception is narrowly construed to require specific intent to injure. *See Birklid v. Boeing Co.*, 127 Wn.2d 853, 860, 904 P.2d 278 (1995). Neither gross negligence nor failure to observe safety procedures and laws governing safety constitutes a specific intent to injure. *See French v. Uribe, Inc.*, 132 Wn. App. 1, 9, 130 P.3d 370 (2006). Nevertheless, depending on the factual circumstances, an employee who contracts COVID-19 in the workplace could argue that this exception applies.

Waivers of Liability

Many employers are considering the use of liability waivers in order to reduce their exposure to employee COVID-19 illness claims. However, as discussed below, this strategy may have the unintended consequence of increasing exposure to employment claims, rather than decreasing exposure.

Courts have traditionally disfavored prospective waivers in the employment context due to the unequal bargaining power between the employer and the employee. Moreover, workers' compensation claims are non-waivable in most states, and in some instances, including such a waiver can invalidate an otherwise valid release.

Even if a court found a waiver of liability enforceable, the potential to backfire is significant. Requiring an employee to sign a COVID-19 waiver may be cited as evidence that the employer is attempting to avoid its statutory obligation under the OSHA Act's General Duty Clause to provide a safe workplace. This could prompt an unwanted inspection by OSHA or one of its state counterparts.

Moreover, if an employee voices concerns regarding the waiver, that may set the stage for a future whistleblower claim in the event the employee's terms, conditions, or privileges of employment are altered in any way in the future. *See, e.g.*, ORS 659A.199.

Mitigating Exposure to Employee COVID-19 Claims

Although waivers for use of exculpating an employer are ineffective and generally against public policy, having workers sign an acknowledgement form, rather than a waiver, is a sound practice for employers re-opening their work sites. Such acknowledgments can be utilized to show that employees are apprised of the risks of returning to the workplace amidst the pandemic, that they do so voluntarily, and agree to adhere the employer's protocols.

Ultimately, however, an employer's best defense to COVID-19 illness claims is to take appropriate steps to reduce the spread of the illness in the workplace. Employers should comply with all applicable guidelines from the CDC, OSHA, and state and local governments concerning social distancing, personal protective equipment, and sanitization. Depending on the workplace, it may be appropriate to conduct health screenings of employees before they enter the workplace or to stagger shifts to reduce the number of workers in the workplace at the same time. Additionally, employers should promptly notify employees of suspected or confirmed workplace exposures, while being careful to protect the privacy of the impacted employees by not revealing their identities. Employers should carefully document all of the steps they take to limit the spread of COVID-19 in the workplace.

The novel coronavirus presents novel challenges and as such, employers are well advised to engage experienced employment counsel to help navigate these complex and delicate considerations and the myriad laws implicated. Buchalter Attorneys have decades of experience providing counsel to employers on complex workplace issues and applicable laws and are uniquely equipped to help clients adapt and navigate these specific challenges. If we can be of assistance, please feel free to contact any of the Buchalter Attorneys below.

Robert S. Cooper
Shareholder
(213) 891-5230
rcooper@buchalter.com

Alexandra Shulman
Of Counsel
(503) 226-8625
ashulman@buchalter.com