# Workplace Injury Claims

The COVID-19 pandemic presents companies with unprecedented risks and challenges in conducting what once were normal business operations. As organizations reopen or expand their current operations and employees return to work, employers will face significant potential risk and liability from the possible transmission of COVID-19 in the workplace. These risks extend beyond traditional employment and worker's compensation claims. As we have seen with the handful of COVID-19 workplaces lawsuits filed already, tort claims are poised to enter into the mix of legal issues employers will face as part of the "new normal."

## Potential Issues and Risks

- **Tort Claims by Employees.** One threshold question is whether employees contracting COVID-19 could bring tort claims against their employers. In many states, workplace illnesses and injuries are subject to worker's compensation exclusivity provisions, which limit claims for on-the-job injuries and illnesses to worker's compensation coverage. However, it is not entirely clear whether COVID-19 will be a covered injury or illness in all states. Some states, via legislation and/or regulation, are taking steps to deem COVID-19 covered by worker's compensation laws, at least with respect to certain occupations at high risk of job-related infection (e.g., nurses and first responders). But whether infected employees' claims would be subject to worker's compensation exclusivity provisions remains an open question in many states. If the claims are not subject to the worker's compensation exclusivity bar, employers could potentially face the full range of negligence and other tort-related claims from employees sickened by the virus.

- **Intentional Torts.** One means by which the plaintiff's bar seeks to circumvent worker's compensation exclusivity bars in many states is to allege that an employer committed an intentional tort that resulted in the employee's injury. The standard for what constitutes intentional tortious conduct for these purposes varies from state to state. Nevertheless, employees may allege that employers knowingly and/or intentionally exposed them to other employees they knew to be infected, by failing to require quarantine of infected employees; disregarding NIOSH workplace hazard reduction standards; failing to adequately sanitize facilities and maintain appropriate social distancing and related protocols intended to inhibit the spread of the virus; ignoring employment law obligations; refusing to provide adequate personal protective equipment; failing to conduct appropriate temperature monitoring and COVID-19 testing; disregarding OSHA and CDC guidance; and requiring sick employees to come into work. The legal standard for asserting intentional tort claims to avoid worker's compensation exclusivity provisions tends to be quite high; generally, a plaintiff must allege that the employer intended the injury, or that the injury was certain to occur from the employer's behavior. Still, aggressive plaintiff's lawyers are likely to assert intentional tort claims to try to maximize potential recoveries.

- **"Take-Home" Claims.** In asbestos and other mass tort litigation involving workplace exposures, practitioners are very familiar with "take-home" litigation. In these cases, a family member or household resident contends that the worker encountered toxic substances (e.g., asbestos, lead, beryllium, benzene) in a workplace, brought those materials home on clothing or otherwise, and

caused exposures in the home. Take-home lawsuits have existed in the asbestos world for many years and have resulted in extensive litigation over the existence and scope of a duty to the non-employee plaintiff, the timing of "foreseeability" evidence, and the efforts of an employer to protect against take-home disease.

The COVID-19 pandemic will almost certainly produce take-home litigation. Not only will employers face workers' compensation and possibly tort lawsuits brought by their own employees, but family members of employees may also contend that the worker carried the virus home and introduced the disease to others.

- **Public Nuisance.** Some employees who claim to have contracted COVID-19 at their workplace may seek to avoid the worker's compensation law bar by alleging that their employer's business constitutes a "public nuisance" that contributed to the community spread of COVID-19. Plaintiffs may claim that the spread of COVID-19 from the employer's facility constitutes an injury to the public at large, but that they have suffered special harm, and therefore have standing to sue for damages and/or injunctive relief. Employee plaintiffs may also allege that they contracted COVID-19 during off-hours from nuisance conditions arising from or existing at the employer's facility – for example, by contact with a fellow employee outside of working hours – in an effort to avoid the worker's compensation bar. Similar claims have been asserted in the past for a variety of toxic substances like asbestos and mold.

## Steps to Reduce Risks

Businesses addressing COVID-19 workplace issues should be prepared to address the risks and concerns listed above. Specific strategies should include consideration of the following:

- **Document the State of Knowledge.** The rapidly changing nature and widely varying recommendations relating to coronavirus will create litigation fodder for plaintiff attorneys who want to contend that an employer "should have known" early in the pandemic that coronavirus could spread in the workplace. To help defend against litigation, employers would be wise to document and date carefully the incoming knowledge from federal and state governments and health officials, along with formal guidance provided to workplaces, to build a future timeline to protect against overly-aggressive claims of early knowledge. Clear and rapid dissemination of information and policies to employees will also help create a record of prompt compliance with the changing conditions. Training managers and non-managers as to the employer's measures will also help reduce risks. Employers may need to designate a safety or medical official or other key employee to serve as the gathering point for information receipt and dissemination. That person may need to serve as a key company witness later, so his or her capacity for testifying is a consideration.

- **Follow Good Workplace Practices.** The best defense against workplace injury claims is a workforce free of disease. The same practices that would protect employees from disease are those that would also protect family members and others. Following CDC, EEOC and OSHA guidelines is important, and perhaps critical if certain liability protection measures are legislatively adopted. Adherence to NIOSH "hierarchy of controls" workplace hazard standards, social distancing, robust cleaning and disinfecting protocols, hand-washing, use of masks and gloves, and worksite testing when available have become the tools we use today to protect

workers. To protect workers and assist in defending litigation, companies may also want to instruct employees to engage in disinfection and cleaning practices, both following activities that could lead to exposure and before leaving work, and provide the means to do so. Similar practices are already well established in OSHA standards and elsewhere for workers handling toxic substances. Employers should consult federal and state instructions and consult with local health officials or experts in the field to determine the best course. Companies should also continue to pay close attention to relevant state and local government closure, shelter-in-place and "reopening" orders, many of which will be relevant in establishing the standard of care. If the company performs testing on employees, the results could, and likely will, identify workers who are infected. In such cases, the company should explicitly follow applicable medical and workplace standards to prevent the spread of the infection. As reliable testing becomes more widely available, the employer's ability to defend litigation would be enhanced by introducing COVID-19 testing to the worksite. Presumably, public health and other regulatory guidance will continue to require infected workers to stay at home and would require quarantine of workers in close contact with an infected worker. Such protections would have the added benefit of cutting off the causation chain, as well, and would thus add to the employer's defense as a proactive company if litigation ensues.

- **Adopt New Practices to Prevent Spread.** The drastic changes in workplace practices resulting from COVID-19 will also help a company defend against claims and litigation if implemented promptly and effectively. Many businesses have already adopted new practices to prevent the spread of COVID-19 from workers to customers, and vice-versa. Social distancing for customers and workers alike, where possible, is becoming a common business facility measure. Depending on the application, such as with close work stations, businesses and manufacturing facilities may need to follow recommended practices by installing plexiglass or other physical barriers, as grocery stores, pharmacies, and similar places have already done. Signage that encourages safe practices like social distancing and mask-wearing is also part of a package of workplace protections in many locations. In addition, training programs to instruct workers on proper measures to prevent the spread of the virus are important. To help defend against negligence and intentional tort claims, employers should not only implement such measures where so advised, but should also document the implementation with photographs and other evidence needed for litigation.

- **Use Monitoring Strategies to Limit Workplace Exposure.** Plaintiffs should face a considerable hurdle in proving that they contracted COVID-19 from a workplace exposure (although various worker's compensation laws and regulations are being revised to adopt presumptions that workers in various "front-line" occupations contracted the disease at work). The transmission of coronavirus is decidedly difficult to trace in any context. Attributing the disease to one family member, and to that member's workplace, creates a chain of causation issues. Nevertheless, companies should carefully monitor employees in the workplace to document that at any given time (1) there was no disease identified in the facility, and/or (2) the worker was not in close contact with those who may have had the disease. Photographs and video of worker distancing, warning signs, physical barriers, employees wearing masks, floor markings, and so on, with their dates preserved, could serve as critical evidence to help defeat plaintiffs' efforts to speculate about the causation chain.

- **Seek Expert Advice.** Before reopening factories, stores, offices, and other facilities, a company could consider retaining experts in industrial hygiene, employment law and human resources, worker protection, and other relevant fields to inspect facilities and give them a "clean bill of health" before allowing workers to return. Although such measures would not likely immunize the company from liability, engaging experts prior to readmitting employees (and customers) to the company's facilities would likely impress upon a court and a jury the company's commitment to worker health and safety.

- **Assess Existing Legislative Liability Protections.** Certain workplaces (particularly those in health care-related fields) may be able to avail themselves of existing liability protections under the Public Readiness and Emergency Preparedness (PREP) Act, which extends liability protection to any "covered person" with respect to all "claims for loss" caused by, arising out of, relating to, or resulting from the "administration" or "use" of a "covered countermeasure" if an emergency declaration has been issued with respect to that countermeasure.

- **Seek Legislative Solutions For Liability Protection.** Bills circulating in Congress and in some states would enact some form of liability protection for businesses as they reopen from COVID-19-ordered closures. [Note that a number of states have already extended immunity to health care providers]. According to news reports, some measures would include liability protection for employers in the absence of gross negligence or reckless or wanton misconduct. Among the measures being considered, according to recent articles in the Washington Post and Wall Street Journal, is a federal government fund to pay out COVID-19-related claims. A similar compensation fund, called the Countermeasures Injury Compensation Program, exists under the PREP Act. Liability protection legislation is likely to be hotly contested at both the federal and state level, however.

## Why Crowell & Moring?

**Litigation Experience.** Crowell & Moring has an experienced litigation team focused on defense of personal injury, employment, and occupational exposure claims. We defend our clients in class actions and other high-stakes litigation. Our firm has defended workplace injury and "take-home" litigation for more than 20 years in the asbestos, beryllium, benzene, and other toxic substances contexts. Our litigators have extensive experience defending high-profile intentional tort claims and public nuisance lawsuits brought by private litigants and governmental authorities. Some of our key representations and wins include:

- **Occupational and Environmental Exposure.** We have extensive experience in defending high-stakes litigation over alleged occupational and environmental exposures, including:
    - Defending a major defense contractor in personal injury lawsuits alleging occupational, take-home, and environmental exposure to beryllium, defeating class certification after a four-day evidentiary hearing in an action seeking lifetime medical monitoring for chronic beryllium disease.
    - Defending two of the nation's largest chemical manufacturers against 25 plaintiffs' claims of occupational asthma as a result of exposure to isocyanates and ethylene diamine in the manufacture of the Gore-Tex® waterproof membrane. After a nine-week

trial, the jury returned 75 defense verdicts for the two companies and a co-defendant. We successfully defended the verdicts twice on appeal, establishing the "sophisticated user" defense as the law of Maryland.

- Together with Louisville co-counsel, defending thousands of personal injury and property damage claims brought by workers and neighbors at a Superfund site in southeastern Kentucky. We defended bellwether plaintiff claims of multiple myeloma, childhood leukemia, and other illnesses in a 52-day jury trial in federal court that led to a mass settlement of more than 550 plaintiffs' cases. We won a week-long arbitration of a tort action alleging "outrageous conduct."
- Defending a transportation company in several high-profile class actions and mass actions, including achieving and upholding on appeal summary judgment in a putative class action litigation seeking medical monitoring following chemical exposures and successfully obtaining dismissal of claims arising from natural disasters on duty and preemption grounds.
- Achieving and upholding on appeal the dismissal of numerous coal companies in class actions alleging global warming in federal district and appellate courts, and before the U.S. Supreme Court.

- **Take-Home Claim Defense.** We have defended a number of firm clients in dozens of asbestos cases alleging take-home disease. We routinely develop and present industrial hygiene, medical, and workplace experts to demonstrate the lack of foreseeability and causation in these cases. Our asbestos team also briefed and won two key "no duty" cases before the Delaware Supreme Court – *Riedel v. ICI Americas, Inc.*, 968 A.2d 17 (Del. 2009), and *Price v. E. I. du Pont de Nemours & Co.*, 26 A.3d 162 (Del. 2011). Both were household asbestos claims against employers.

- **Appellate Expertise.** In 2015, we developed and wrote an amicus brief, in conjunction with Arizona counsel, supporting defendants' contention that Arizona should not depart from its "duty" approach to take-home cases and should reject foreseeability as a standard. The defendants won on appeal, including before the Arizona Supreme Court.

- **Class Action and MDL Experience.** We are recognized as one of the premier class action practices in the nation. We represent clients in cutting-edge and high-profile class actions in courts across the country. Our cases span industries and issues – from automotive consumer class actions for GM, to iPhones and iPad class actions for AT&T, to antitrust class actions for the Blue Cross Blue Shield companies, to nationwide wage & hour and pay equity cases, to MTBE exposure cases for major oil companies. We handle class actions in state and federal court as well as centralized multidistrict litigation proceedings. We have defended certified class actions in jury and bench trials. We also have extensive experience handling class action appeals at all levels, including the U.S. Supreme Court. And while our focus is on devising strategies to defeat class certification, we also excel at crafting creative class settlements and guiding them through the court approval process.