
Back to Business: Premises Liability Considerations

Video Transcript

As companies consider returning to full operation in the wake of the COVID-19 crisis, they will need to adapt to new realities imposed by the global pandemic. As part of our ongoing video series, Back to Business: Considerations in the Wake of COVID, we'll be exploring how to reduce and mitigate the risk of customers making claims based on alleged exposure to coronavirus in business establishments.

Owners of retail and other locations open to the public, such as restaurants, hotels, health clubs, and sporting venues, are generally aware that they have a duty to their customers. The law imposes a level of responsibility for the well-being of customers while those individuals are on their property. In most states, the standard applied to determine liability when a customer (in legal terminology an invitee) is injured, is whether the owner knew or should have known about the unsafe condition and failed to exercise reasonable care to eliminate or reduce the risk presented by that unsafe condition. As states and localities prepare to reopen for business in the wake of the COVID pandemic closures, what responsibilities will owners have regarding the risk of the spread of the COVID-19 virus? We can expect to see lawsuits from plaintiffs claiming that they contracted the coronavirus from a location because of the negligence of that location's owners. Such plaintiffs will likely argue that (1) the owner of the location was aware that the coronavirus could be transmitted within the establishment; and (2) the owners failed to put in place reasonable measures to prevent or minimize the spread of coronavirus at their establishment or failed to warn customers that they had reason to believe persons with COVID-19 had been present at their location. For the purposes of this discussion, we will assume that owners know or should know that COVID-19 is currently being spread through community transmission across the United States, and we will assume that the risky condition, the presence of coronavirus, is likely to be encountered in any location open to the public. The relevant question is, what constitutes exercising reasonable care to reduce the risk of the spread of the COVID-19 virus? No court has yet addressed this issue. But in the event an owner is sued by a customer who claims that he or she was infected with the coronavirus at the owner's business, the owner wants to put itself in the best position possible to argue to a court that it took reasonable steps to prevent such a transmission. Accordingly, owners should consider the following when putting together their return-to-work plans:

- What are the federal, state, and local rules governing the reopening of your business? For example, if you own a restaurant and your municipality has allowed restaurants to reopen at half-capacity, then you would begin by ensuring that you are only operating at half-capacity.
- Another benchmark would be to follow the CDC recommendations. Although doing so is not a legal requirement, courts have previously relied on the recommendations of the CDC as establishing what is objectively reasonable conduct under the circumstances.
- Another consideration is, what recommendations are being put in place by industry associations or other expert bodies? For example, in Maryland the Department of Commerce has formed 13 industry recovery advisory groups, which include industries such as retail, accommodations, sports, and bars and restaurants. Each advisory group will be developing recommendations and best practices for the industry. Legislation is also being proposed at many levels of government that would insulate certain businesses and/or industries from liability for claims that someone has contracted coronavirus at their location.
- You should also consider whether to require masks and or gloves to be worn within your establishment. Should you place physical barriers between your employees and your customers? What form of social distancing, if any, do you

require within the establishment? Is it appropriate to put marks on the floor to indicate how far apart people should stand? Will you limit the number of people within your establishment at any given time? What kind of messaging should you use within the location? Are signs appropriate, either to identify the risk of COVID-19 transmission or to identify the rules you have put in place within the location? What kind of cleaning services should you use, and how often should they clean? What kind of cleaning should occur throughout the day? Should you provide cleaning materials such as hand sanitizers to the public to use within your location? Remember, no one plan is right for every business.

- Another major consideration will be what to do if and when either an employee who has been onsite contracts or tests positive for COVID-19 or you learn that a customer who has been to your location recently contracted the virus. A safe strategy would address the steps the owner would take if such an event occurs. Will you shut down? If so, for how long? Will you publicly notify customers that have been to your premises recently?

While there are no clear-cut answers to these questions, as noted previously, business owners should put thoughtful measures in place, especially when first reopening, to address the potential for coronavirus transmission within their location. Such plans should then be reviewed on a regular basis and revised as appropriate as COVID-19 restrictions continue to evolve in your area.

Venable is actively monitoring these issues and working with clients to evaluate and respond to other emerging business, legal, and operational challenges arising from the pandemic. If you're interested in the related topic of toxic tort liability, please check out Venable partner Matt McLaughlin's video on the subject, and visit our COVID-19 resource center at [Venable.com/COVID-19](https://www.venable.com/COVID-19) to explore our extensive collection of analysis, webinars, and other relevant insights. Thank you and stay safe.

Links

[Venable.com/COVID-19](https://www.venable.com/COVID-19)



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