
Back to Business: Tort Liability

Video Transcript

As part of our ongoing back to business series to assist clients with reopening during and after the pandemic outbreak, we are addressing a very specific field of tort liability here; it's known as take-home toxic torts. Take-home toxic torts relate to employer liability to third-party non-employees. So this section is specific to the liability that an employer has if employees bring the virus home and infect family members or other folks who live in the house with the employee. Pretty much everyone reading this alert already knows as a matter of black-letter law that the employer owes a duty of care to ensure a reasonably safe workplace for the employee. Less well known is that in certain states courts hold that employers owe a duty of care to third-party non-employees, such as spouses and family members of employees, who are themselves exposed to harmful agents brought home from the workplace by the employee. Some states that have this kind of doctrine are, for example, New Jersey, Pennsylvania, and Illinois. So you have two levels of risk as an employer: first, you have the employees themselves claiming exposure to the coronavirus at the workplace because of the employer's failure to exercise reasonable care; but there's a second level of derivative liability that we're focusing on specifically in this alert. And that arises potentially from family members of employees who themselves become infected. This is the take-home toxic tort theory of liability. It creates a sort of secondary or tertiary layer of peripheral plaintiffs out there. The states adopting this theory of liability have held that the harm to the third party (that is, the person at home, the non-employee) is a foreseeable consequence of the employer's failure to take reasonable steps in the workplace. That foreseeability itself gives rise to a duty of care to the third-party non-employee.

Now as has been noted before, the law is not uniform, and there are many states that refuse to extend this duty of care beyond the employer-employee relationship. Those stricter states are, for example, Ohio, Delaware, and Michigan, just to name a few. Those states come at it from the perspective of limiting the liability to the relationship between the employer and employee. These states basically ask themselves: Well, where would the duty stop, if we went beyond the relationship of employer and employee? Would it pertain to the bus driver who gets infected by the employee on the way home, or to someone who touches the employee in the street? Those states don't want to go as far as extending the duty of care any further than the relationship between employer and employee. There are, however, a lot of decisions, dozens from high courts around the country, holding that the employer's awareness of the risk to non-employees, combined with the failure to take proper preventative precautions, renders the employer liable to third parties for harm exported to the home.

If you're looking for one crystal-clear decision on this point, there's a decision from 2016 from the New Jersey Supreme Court (*Schwartz v. Accuratus*, 139 A.3d 84). In this case the duty was extended to an employee's non-spouse occasional cohabitant (i.e., girlfriend) who was sickened by a beryllium ingestion when the employee came home and exposed his girlfriend to beryllium. The girlfriend, peripheral plaintiff though she was, was found to have a claim against the employer. All of this law derives basically from that field of cases in the last 30 or 40 years, related to manufacturers of asbestos for example, who exposed employees to toxins in the workplace; thereafter the employee exposed family members to the toxin at home; and the family members were held to have a claim. Now in this case and in the historical backlog of cases, the toxin was usually a tangible substance like asbestos or beryllium, some kind of material brought home by the employee. A virus is a different species of harmful agent, but the Plaintiffs' Bar is going to make an effort to extend the take-home tort theory of liability to the post-pandemic world. The coronavirus is a known threat, and it is foreseeable that the employee would return home contagious with a deadly virus that spreads to family members. And the Plaintiffs' Bar is going to take the position that the family members have a claim against the employer. So Venable has been looking at the state of the law, and in the current environment it seems likely that Plaintiffs' firms will target employers who open too early, or without some of the preventative measures in place that

our attorneys have been talking about in some of our other webinars with respect to safe reopening. But inasmuch as the virus has already hit cruise lines, and it has already hit the federal government for failure to provide protective wear to people who work in veterans' homes, in veterans' hospitals, and in prisons, unless the government provides some form of insulation of liability protection – a safe harbor, if you will – to employers, these derivative secondary liability suits, we think, are coming down the pike.

Venable has been watching the post-COVID outbreak developments, both politically and in the legal world. We have a task force monitoring the environment. And this short alert, which I hope was helpful, is just one of many areas in which we are advising clients, and we have been presenting many webinars related to safely reopening. If you have questions about our webinars or any other related area, there's a COVID task force portion on our website that you can click on. And if you need more detailed assistance, please call us. We hope this alert has been helpful to you, and, most importantly, we hope that you're safe.

Links

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