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## What Employers Can Learn From Early COVID-19 Employee Lawsuits

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Just as businesses are beginning to face the initial wave of COVID-19 impacts, lawyers are seeing the first wave of employee lawsuits. It is premature to even call these the tip of the iceberg, but the lessons from these early cases can prove meaningful and help businesses mitigate risk.

Ordinarily, workplace injuries and illnesses are handled through each state's workers' compensation system, but most states have exceptions that allow employees to bring a direct lawsuit for pain and suffering damages if certain conditions are met. The standards to bring such claims vary state-by-state, but, generally, an employee must show the employer engaged in something more than ordinary negligent conduct (often gross negligence), such as removing a safety guard from machinery. Certain states allow employees to bring direct claims if the injury occurred under circumstances where an employer knew or should have known with substantial certainty that the injury would occur and those circumstances deviated from standard industry practice. These claims, especially if there are other similarly injured employees, create significant risk for businesses and may not be covered by insurance.

As it relates to injuries from COVID-19, we are seeing employees claim that they contracted the virus in their workplace because their employers failed to take necessary, industry-standard precautions under circumstances in which injury was substantially certain. It remains to be seen whether employees will be able to show their COVID-19 complications were workplace injuries and how courts will delineate what employer lapses extend beyond ordinary negligence, but there are important lessons from these early cases that may help businesses limit risk.

In one recent example, the estate of a former Walmart employee brought an action against the retailer in Illinois state court after the employee died from COVID-19 complications. In the suit, the estate alleges Walmart knew or should have known COVID-19 was present and active in the store, but failed to protect its workers in accordance with industry standards. According to the employee's estate, management knew several workers and individuals had symptoms of COVID-19, however, it did not (i) cleanse and sterilize the store in order to prevent COVID-19 infection; (ii) implement, promote and enforce social distancing guidelines promulgated by governmental entities; (iii) provide the employee and other workers with personal protective equipment such as masks, latex gloves, and other devices designed to prevent COVID-19 infection; (iv) warn the employee and other workers that various individuals were experiencing symptoms at the store and may have been infected by the coronavirus; (v) address other workers at the store who communicated to management that they were experiencing COVID-19 signs and symptoms; (vi) follow COVID-19 guidelines issued by OSHA and the CDC, including providing employees with antibacterial soaps and wipes and other cleaning agents; and (vii) implement policies and procedures to promptly identify and isolate sick people as also recommended by the CDC.

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Of course, at this stage these are only allegations and we do not have the benefit of Walmart's response, but the allegations are instructive as they are guideposts to the kind of conduct that may give rise to liability. Paying attention to them will allow employers to implement policies and procedures that will protect employees and mitigate the risk of claims that the employer's conduct is sufficient to support a claim that seeks recovery beyond that available under through the workers' compensation system.

***Savvy employer's takeaway: While it presents a unique challenge for employers to meet new and changing guidelines for maintaining operations, it is vital that employers stay abreast of all current federal, state, and local guidance, including guidance from the CDC and OSHA, and maintain and enforce policies consistent with that guidance.***

The attorneys at Flaster Greenberg are following developments related to the COVID-19 Pandemic and formed a response team and to work with businesses to keep them up-to-date on developments that impact their business. For more information on what employers can do to comply with the changing law and manage risk, we invite you to contact Adam Gersh, or any member of Flaster Greenberg's Labor and Employment Practice Group.

#### **ATTORNEYS MENTIONED**

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