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RETURNING TO THE WORKPLACE

Litigation Trends and Safety Protocols

Six months following the worst public health crisis in over 100 years, businesses are slowly beginning to reopen. Businesses across the country face unique challenges in formulating and implementing return-to-work strategies which protect them from liability as well as providing a safe and secure workplace for their employees. While each return-to-work strategy should respond to local circumstances, there are certain fundamental protocols which, if followed, should help minimize the risk to employers of liability over workplace conditions.

We expect to see a rise in COVID-19 related litigation – through both first-party business interruption claims and third-party liability claims. Business interruption claims are on the rise and have resulted in a litigation boom. Of particular concern is the influx of wrongful death cases arising out of alleged COVID-19 exposure. Below is a synopsis of such litigation trends, questions to ponder, and safety measures as well as protocols to consider for the new workplace.

--First Party Claims--

In the first-party context, a plethora of lawsuits have been filed arising out of state-mandated closures. Specifically, Executive Orders shutting down or limiting the operations of non-essential retailers across the nation have caused many businesses to file claims for business interruption coverage. However, these claims have been almost universally denied by carriers. The reasons for the denial of these claims vary but generally come down to two factors: 1) a virus/communicable disease exclusion; and 2) the lack of a "direct physical loss" to insured property which is a requisite for business income or extra expense coverage (and typically "civil authority" coverage).

Virus/communicable disease exclusions are entirely untested, as they were only recently adopted by the insurance industry in response to the 2003 SARS outbreak. The "direct physical loss" issue has been addressed by numerous courts across the country in different contexts. Some courts have found that actual physical or structural alteration of the insured property is required, such as by fire or wind. However, most have found that non-structural changes such as noxious odors or toxic vapors are sufficient. Most importantly, each and every court that has addressed this issue has interpreted the term "direct physical loss" to require at least some physical force that renders the insured property uninhabitable. All

courts have rejected the notion that a loss of use, in and of itself, constitutes a "direct physical loss." For that reason, the insurance industry has correctly concluded that the loss of use of insured property due to an Executive Order, and not because of any physical force affecting the property, is not covered.

According to publicly available data, there are presently more than 1,100 COVID-19 business interruption coverage lawsuits pending in state and federal courts across the country. Motions to dismiss for failure to state a claim have been filed in 250 of those cases. To date, carriers have the edge in terms of success on motions to dismiss with 18 motions having been decided and 12 of those having been granted. M&W currently has one motion to dismiss pending in New Jersey District Court and several in state court. One New Jersey state court case has already reached the Appellate Division on a motion for leave to file an interlocutory appeal after a motion to dismiss was denied. Unsurprisingly, the Appellate Division denied the motion for interlocutory review. Eventually this issue will reach the Appellate Division and it will have no choice but to rule on the merits. We believe that rules of policy construction, the plain language of the policies and common sense militate against coverage of claims that carry no factual allegations of physical damage.

-- Third Party Liability --

New Jersey courts have long recognized that "a person who negligently exposes another to a contagious disease, which the other contracts, is liable in damages." Earle v. Kuklo, 26 N.J. Super. 471 (App. Div. 1953). Most jurisdictions follow similar tort rules. For example, "The degree of diligence required to prevent exposing another to a contagious or infectious disease depends upon the character of the disease and the danger of communicating it to others . . . [and] it must be proved that the defendant knew of the presence of the disease." Mussivand v. David, 544 N.E.2d 269 (Ohio Supreme Court 1989). Indeed, any claim for negligence requires not only the breach of an established duty, but also damages proximately caused by such breach.

Should we expect that COVID-19 patients or the families of those lost to COVID will file suit in large numbers against employers, coworkers, or owners of businesses where they may have exposed? This is certainly a possibility. As to employers and coworkers, the sole avenue for relief would be a workers compensation claim - unless the employee can demonstrate that the injuries s/he sustained were a "substantial certainty."

What about third party lawsuits against individuals or entities whose acts or omissions may have caused the plaintiff to contract COVID-19? Presumably, our courts would be hesitant to open the floodgates of litigation amidst novel circumstances and rapidly-evolving theories of transmission. We would expect that causes of action would be countenanced only for the most egregious behavior; i.e, gross negligence, which requires a showing of intentional or reckless disregard for the safety of the lives of others.

Applying the above principles, certainly someone who has been diagnosed with the disease has a duty to act reasonably so as to avoid the exposure of another. A grayer area exists as to someone who is exhibiting non-specific symptoms consistent with the disease but has not been diagnosed. Even less clear is whether liability could lie against someone who is aware of having been exposed to the disease but is not exhibiting any symptoms.

As to reasonable conduct, we would expect courts to employ a sliding scale, requiring a higher degree of circumspection as the suspicion or knowledge of the diagnosis increases. In any claim for negligence, reasonableness is a function of all attendant circumstances, and in many scenarios, it would be demonstrated by advising the potential claimant promptly of a suspected or confirmed diagnosis. An employee who goes to work with knowledge that s/he has been diagnosed with the disease, has symptoms consistent with the disease or with knowledge that s/he has been exposed could be held liable for the very act of going to work if doing so presents a risk of transmission to third parties. Similarly, a business that fails to have precautions in place to screen and bar infected employees from the workplace could face liability for exposing customers, clients or other third parties.

Causation is likely to be a large hurdle for any plaintiff seeking damages on due to COVID-19 exposure. How would a plaintiff establish the specific source of the transmission, particularly given the unknowns regarding incubation periods, the vitality of the virus on various types of surfaces, and means of exposure? In other contexts - most notably sexually-transmitted diseases - means of transmission is very specific and usually the proof is that the plaintiff had no other partners. In the coronavirus context, the myriad ways in which the disease may be transmitted and the number of potential sources to whom the COVID-19 patient will be exposed during the period of possible incubation is likely to render proximate cause very difficult to prove. Comparative fault – the potential plaintiff's role in failing to protect his or herself – is also likely to play a large role in any third party litigation.

As with much about the coronavirus, there are more unknowns than knowns and that includes the response to potential third-party litigation by the courts and legislature. Yet, it is important to recognize the potential for such suits and to consider potential defenses in guiding the conduct of your policyholders and your own operations.

-- Workers Compensation: A New Presumption for Essential Workers –

An employee who sustains an injury or contracts an illness while working may receive no-fault benefits from his or her employer under the Workers Compensation Act. In the case of a highly contagious disease such as COVID-19, of course, proving that it was contracted on the job likely would be difficult in the absence of compelling evidence of a high concentration of COVID cases in the workplace and affirmative evidence of little to no possibility of COVID exposure outside the workplace.

Last month the New Jersey legislature answered this challenge by enacting Senate Bill 2380 into law. SB 2380 creates a rebuttable presumption of workers' compensation coverage for

COVID-19 cases contracted by "essential employees" during a public health emergency declared by an executive order of the governor. The law took effect immediately and is retroactive to March 9, 2020.

The law defines "essential employee" as "an employee in the public or private sector who during a state of emergency":

1. is a public safety worker or first responder, including any fire, police or other emergency responders;
2. is involved in providing medical and other healthcare services, emergency transportation, social services, and other care services, including services provided in health care facilities, residential facilities, or homes;
3. performs functions which involve physical proximity to members of the public and are essential to the public's health, safety, and welfare, including transportation services, hotel and other residential services, financial services, and the production, preparation, storage, sale, and distribution of essential goods such as food, beverages, medicine, fuel, and supplies for conducting essential business and work at home; or
4. is any other employee deemed an essential employee by the public authority declaring the state of emergency.

Category four includes any workers deemed essential pursuant to executive orders issued by Governor Murphy during the pandemic, such as grocery store employees, pharmacy employees, medical supply store employees, employees in retail functions of gas stations, convenience store employees, cashiers construction workers, or employees providing childcare services to "essential employees."

Under the new law, in a public health emergency declared by the governor, if an individual contracts COVID-19 during a time in which the individual is working as an essential employee in a place of employment other than the individual's own residence, there shall be a rebuttable presumption that the contraction of the disease is work related and fully compensable for the purposes of workers' compensation benefits.

An employer may rebut this presumption by a preponderance of the evidence showing that the worker was not exposed to the disease while working in the place of employment other than the individual's own residence. This is likely to be very difficult.

--Maintaining a Safe and Suitable Workplace--

While litigants may face an uphill battle in terms of causation, employers should not underestimate the exposure they face and should establish best practices protocols in preparation for our "new normal." To that end, the Centers for Disease Control (CDC) and Occupational Safety and Health Act (OSHA) remain essential resources and their guidelines should be strictly followed. Employers should also consult state and local guidelines for assistance. According to OSHA's general duty clause, an employer is required to "furnish to each of his employees employment and a place of employment which are free from recognized

hazards that are causing or are likely to cause death or serious physical harm to his employees."

The New Jersey Business and Industry Association has implemented a "Healthy and Safe Workplace" certification program, pursuant to which Methfessel & Werbel is proud to have been certified as a Healthy and Safe Workplace.

Programs such as the NJBIA certification program are an excellent means of ensuring compliance with state and federal guidelines, while carrying the likely additional benefit of enhanced liability protection.

In short, employers have a duty to maintain a safe workplace, even during a pandemic, and their actions will be judged by what the reasonable employer would do under similar circumstances. Ultimately, all an employer can do is enforce state and local mandates in their workplaces to the letter and continually communicate to employees what exactly is being done to protect them. Communicating workplace changes to employees thoroughly and often will ensure transparency and build trust between the employer and employee.

Within the confines of the office itself, consider an infectious disease protocol; i.e., the implementation of a cleaning and disinfecting schedule based on CDC guidelines. Specifically, ensure that disinfectants and cleaning supplies are available to all employees and that sanitizing stations are set up for the convenience of employees. Limit visitors, enforce a no-tolerance mask-wearing policy and set limitations on the point of entry into the building, the use of elevators, and the use of bathrooms. Consideration should be given to shared office equipment and tools and switching to the use of disposable items, all designed to limit exposure. Office configuration should also be evaluated to allow for social distancing including conference rooms, waiting rooms, and kitchens.

These uncertain times warrant flexibility for employees. Existing telecommuting policies should be reviewed and a policy established if not already in place. Employees should be reminded of their paid-time off (PTO) entitlement as well as sick leave and personal time off. Sick time, in particular, should be flexible and non-punitive as the threat of COVID-19 remains a continued risk. Consider adjusting these policies as needed, yet remind employees that keeping the workplace safe is a collaborative effort. Additionally, advise employees to stay home if they are running a temperature or are feeling ill. Also require COVID-19 testing following travel and insist on quarantining until results are received. If possible, have thermometers on hand to monitor an employee who becomes symptomatic at work or simply as a preventive measure.

Aside from the virus' physical toll on their employees, employers have to recognize the devastating impact of the pandemic and must understand that returning to work can be a source of anxiety. This is particularly true for those with comorbidities and those with school-aged children. Employers must be committed to considering each individual's unique needs and supporting individuals who are unable to fully return to work by offering reasonable

accommodations when the circumstances require and paid leave to the greatest extent feasible and allowable.

Families First Coronavirus Response Act

On April 1, 2020, the Families First Coronavirus Response Act (FFCRA) was enacted to provide eligible employees with Emergency Paid Sick Leave and Emergency Family and Medical Leave for specified reasons related to COVID-19. Information regarding employee rights and responsibilities under the FFCRA can be found at the following page of the US Department of Labor website.

Generally, the FFCRA provides the following entitlements for employees who have been employed by the employer for at least 30 calendar days prior to submitting the leave request:

- *Two weeks (up to 80 hours) of* ***emergency paid sick leave*** *at the employee's regular* rate of pay where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; **OR**

- *Two weeks (up to 80 hours) of* ***unpaid family leave*** because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19; **AND**

- *Up to an additional 10 weeks of* ***paid expanded family and medical leave*** *at two-thirds the employee's regular rate of pay* where an employee, who has been employed for at least 30 calendar days, is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed for reasons related to COVID-19. This leave can be taken on an intermittent basis. An employer can allow an employee to use accrued sick time for the first ten (10) days prior to the ten (10) weeks at two-thirds pay takes effect. The payment is capped at two-thirds the regular rate of pay or $200 per day, whichever is lesser.

Under current regulations, all leave must be used between April 1, 2020, through December 31, 2020, for the purposes stated above.

Employers should also consider work-from-home options at full pay for those employees who need to be home because their child's school district is utilizing some type of distance learning. However, the employee should be expected to be available during regular work hours and complete a full day of work.

Some employees will submit requests for reasonable accommodations for underlying health conditions which the employees believe place them at greater risk to COVID-19. In those instances, employers must engage in an interactive process with the employee to determine if a reasonable accommodation can be given to the employee that would enable the employee to fulfill the essential job duties and responsibilities of his/her position without placing an undue burden on the employer's operations. Each request by an employee must be treated distinct and apart from others. Employers cannot have a one-size-fits-all approach to accommodation requests. In some instances, the employee may still be treating for a medical condition in which case it must be determined if the employee is eligible to use sick leave or FMLA/FLA.

--Takeaway--

In sum, employers can use this unique opportunity to evolve and grow. Indeed, the threat of COVID-19 transmission should instill in employers a heightened awareness of their physical surroundings. On a more personal front, a deeper appreciation for employees' changed circumstances and that of their families is crucial. Overall, employers should embrace the necessary changes for the greater good and recognize the importance of playing defense in the wake of inevitable litigation. Change in the workplace is not always bad; in fact, it can lead to a more desirable work environment—a safe haven for those of us who use the work day to escape even for a few hours from the harsh reality of 2020.