

# NOVEMBER 2020 NEWSLETTER

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## AN EMPLOYER'S LIABILITY FOR AN EMPLOYEE'S COVID-19 ILLNESS

### FIRM ANNOUNCEMENTS

#### 1. AWARDS:

Pozzuolo Rodden, P.C. is pleased to announce that Martindale-Hubbell, established in 1868 to provide businesses with the address of “one reliable law firm in every city in the United States”, announced that Joseph R. Pozzuolo’s 2021 Peer Review Rating for legal expertise, communication skills and ethical standards is excellent.

#### 2. BLOGS:

1. The following are a few of the business, tax, employment, estate planning and business litigation blogs posted on our main website [www.pozzuolo.com](http://www.pozzuolo.com) during the past month:

- a. New Simpler Forgiveness Application For Certain Paycheck Protection Program Loans;
- b. Keeping Probate Costs Down, and,
- c. Administration Of An Estate Cannot Compel An Alleged Heir To Take A DNA Paternity Test.

Please visit our website [www.pozzuolo.com](http://www.pozzuolo.com) for more information on these and other relevant business, tax, estate, business litigation and employment topics.

2. The following are a few of the family law blogs posted on our family law website [www.pozzuolofamilylaw.com](http://www.pozzuolofamilylaw.com) during the past month:

- a. Post-Nuptial Agreement Ruled Invalid;
- b. The Pandemic And Divorce; and,
- c. What Are Living Together Agreements?

Please visit our website [www.pozzuolofamilylaw.com](http://www.pozzuolofamilylaw.com) for more information on these and other relevant family law topics.

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## AN EMPLOYER'S LIABILITY FOR AN EMPLOYEE'S COVID-19 ILLNESS

First responders and essential workers have been providing care and services to others during the past nine month COVID-19 pandemic period. Plus, many businesses and offices have been gradually reopening. The question this law office has been receiving daily from clients is “When will an employer be liable for COVID work related physical and mental diseases and illnesses?”. This liability can arise in a number of avenues including the failure to provide a safe work environment to protect employees, worker’s compensation claims, discrimination, federal, state and local leave requirements, and even wage and hour claims. Employers need to be aware of the possible legal COVID issues on multiple fronts. This newsletter is to provide a quick summary of what types of liabilities an employer can be exposed relating to COVID and what can be done to avoid such potential liabilities.

### **SAFETY AND PROTECTION OF EMPLOYEES:**

The safety and protection of employees are generally governed by two areas that are highly interrelated: i) tort law; and, ii) OSHA standards. Essentially, the safety and protection of employees comes down to whether the employer is doing “enough” to protect its employee.

For tort liability, an employer could be liable for an employee’s COVID illness or death if it can be shown that the employer: 1) had a duty to the employee; 2) breached that duty; 3) that breach caused an illness and/or injury; and 4) that there was an injury and/or illness. The two biggest factors here will be: i) whether the employer was negligent by failing to provide enough protections; and ii) whether the employer caused the illness/injury.

For whether the employer is negligent, there is no one size fits all as every business is different. There is no silver bullet set of steps, but the Center for Disease Control and Prevention (CDC) and OSHA have general guidelines for what approach to take. The CDC has guidelines on its website and OSHA has published OSHA 4045-06 2020, a “Guidance on Returning to Work” guide, which encourages employers to make a hazard assessment, have

supplies on hand including disinfectants to promote better hygiene, promote social distancing, identify and isolate sick employees that test positive, implement physical controls such as barriers where appropriate, provide workplace flexibility without the fear of reprisal, and train employees with relation to COVID to minimize risks.

While nothing is full proof, if the employer is devoid of any protections, the employer opens itself up to potential liability. To avoid this, the employer should review the CDC and OSHA guidelines and assess what protections are reasonable for its business. Through this, an employer may realize it needs to buy hand sanitizer, have hand sanitizer dispensers, buy disposable gloves, establish mask policies, provide masks, provide other personal protective equipment and supplies (PPE), install partitions or better partitions, have easy access for employees to wash hands with soap and water, have temperature checks, etc. However, a more protective step would be to retain a consultant to evaluate such guidelines and make recommendations.

Further, if an employee gets COVID, it is not necessarily from the workplace. Employees may have been exposed from other places especially if no other employees have tested positive. That being said, if an employee is known to have COVID, it is necessary to quarantine that employee, thoroughly clean and disinfect any and all areas that the infected employee was in contact with, and have all other employees who were in contact with the infected employee tested and/or quarantined to avoid a possible spread. Most importantly, steps must be taken to make sure employees who were in contact with the infected employee do not spread the virus by repeated testing and temperature taking and asking employees to stay quarantined at home for 14 days even if he/she tested negative without fear of reprisal if they have a mild cough or lower grade fever or are not feeling well.

Not only is there a potential tort liability, but there can be OSHA violations for failing to comply with CDC and other public health guidelines. Under OSHA standards, employers have to keep the place of employment free from recognized hazards that cause or are likely to cause death or serious harm. As a result, again, it is important for the employer to evaluate its work environment with relation to CDC and OSHA standards and/or to retain a consultant to make and implement its recommendations avoid potential liability for COVID related illnesses.

### **WORKERS' COMPENSATION:**

Even if an employer is not negligent, the employer may be responsible through workers' compensation. The key fact here is not whether the employer was negligent but whether the COVID related illness is work related. With workers' compensation, the simplest example is an employee may tweak his knee playing basketball at the gym on Saturday, and then fake a fall on Monday at work lifting a box. The same example applies with COVID. It may be difficult to definitively pin the source, but the better the procedures in place such as the use of proper personal protective equipment (PPE), disinfectants, taking of temperatures, protective masks and knowing that no other employee has contracted COVID before and after the diagnosis is evidence that it may not be work related.

**DISCRIMINATION:**

With the concern for personal safety and heighten anxiety during the COVID crises, steps still need to be taken to ensure an employer is not discriminating against a protected class. For instance, requiring older or covered employees under the Americans with Disabilities Act (“ADA”) to stay home or limiting their hours, or failing to provide reasonable accommodation to protect against a COVID outbreak, it may lead to a discrimination case. For instance, if an employee protected under the ADA requests a barrier or request that all co-workers and customers wear masks when near him/her due to a weakened immune system, this is strongly arguable to be a request for reasonable accommodations. The failure to accommodate such request could lead to a discrimination claim against the employer. Additionally, certain employees may accuse the employer of using COVID as a pretext to terminate the employment of individuals of a protected class. Accordingly, an employer must be cognizant if it is indirectly causing an adverse working condition, termination or reduction of hours on employees of a protected class.

**LEAVE REQUIREMENTS:**

Under the Families First Coronavirus Response Act (the “FFCRA”), employees are allowed to request paid leave subject to certain limits for up to two weeks for certain COVID related reasons, such as a need for child care when a child’s school or daycare center is closed, through December 31, 2020. Additionally, employees employed for at least 30 days are eligible for up to an additional 10 weeks of paid family leave to care for a child under certain circumstances related to COVID. If an employee is wrongfully denied such leave the employer could be subject to substantial penalties. On the positive side, if such leave is given, employers with fewer than 500 employees are permitted to receive tax credits for wages paid.

**WAGE AND HOURS:**

Employers may also come under scrutiny for wage and hour practices. In this new COVID world, many employees are expected to work from home and are paid one sum for all hours worked, however, the hours worked may not be as precise with employees working from home. This may result in the failure to track overtime hours or whether wages have dipped below minimum wage requirements as employees are now expected to respond to requests at all hours instead of specific times. There may have also been impermissible salary/compensation reductions. All of these could potentially have wage and hour implications.

**PRIVACY:**

The employer is required to securely store the employees’ medical information including whether an employee tested positive for COVID or other related information. The employer should not announce “so and so went home because they had COVID”, but should say it in a way not to directly or indirectly identify such employee. If an employee comes forth about an immunodeficiency making him/her more susceptible to COVID, information

like this needs to be safeguarded. The employer needs to take steps to safeguard and keep private employee information.

**SUMMARY:**

Employers generally have many legal responsibilities to their employees, but COVID and all of the new protections/laws surrounding it create a minefield for employers, some of which may simply be trying to do the right thing. There is no perfect plan, but it is all about doing “enough.” Part of doing enough is reviewing the policies, procedures and steps taken to reduce the risk in each of these potential liability areas. This requires reviewing your policies and procedures compared to CDC and OSHA guidelines, taking a step back when making major decisions such as major layoffs or reductions of salary/hours, adding new procedures to stay on top of wages and hour law compliance, and ensuring employee health information is given the proper privacy and security. As usual, all of our attorneys are available to discuss and review any specific questions you may have.

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This newsletter is courtesy of Pozzuolo Rodden, P.C.

To subscribe, unsubscribe, or for any questions, please contact us at [INFO@POZZUOLO.COM](mailto:INFO@POZZUOLO.COM).